Specialized Work Experience

Specialized Work Experience **Appellate, Death Penalty, Habeas**

Recommenders

Bernell, Ben
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

William "Seth" Cook

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June 3rd, 2023

The Honorable Chief Judge Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street, Room 14613
Philadelphia, Pennsylvania 19106

Dear Chief Judge Sánchez:

Enclosed, please find my application for a clerkship in your chambers for the 2024-25 term. I am a recent graduate of the University of Texas School of Law. This fall, I will clerk for Justice Debra H. Lehrmann on the Supreme Court of Texas. I am especially interested in your clerkship for several reasons. First, my parents live about an hour west of Philadelphia, and my wife and I are eager to be nearer to them as we start our family. Second, and most important, is your career as a public servant.

This past semester I worked for Texas Law's Capital Punishment Clinic, representing men on Texas's Death Row. During my time in the clinic, I helped draft a state habeas petition, a direct appeal to the Texas Court of Criminal Appeals, state and federal district court motions, and a Fifth Circuit brief. Last fall we represented Tracy Beatty who, despite our efforts, was executed in early November. While this was devastating, knowing our work reaffirmed his inherent dignity in his last few months meant our work was far from meaningless. Thankfully, I have also had the privilege of seeing the other side of the work. This spring, Ivan Cantu had his execution date withdrawn after the clinic assisted appointed counsel with his state habeas petition.

While death penalty work can be discouraging, this clinic is unquestionably the most meaningful thing I have ever done and has radically reshaped my career goal, which is now to work for the Philadelphia Federal Community Defender's Office. While many clerkships would be invaluable for this goal, I am especially interested in clerking for a judge with significant public defense experience. Your career representing indigent defendants and supporting underserved communities with the Legal Aid of Chester County is incredibly inspiring, and I would be honored to serve as a law clerk in your chambers.

My application includes my resume, transcript, writing sample, and three professional references. These references may be reached as follows:

- Jordan M. Steiker, Professor of Law, University of Texas School of Law
  jsteiker@law.utexas.edu; (512) 680-4709

- Lawrence G. Sager, Professor of Law, University of Texas School of Law
  lsager@law.utexas.edu; (512) 698-6842

- Ben Bernell, Partner, Pillsbury, Winthrop, Shaw & Pittman LLP
  Ben.bernell@pillsburylaw.com; (512) 580-9631

Respectfully,

Seth Cook

William "Seth" Cook

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EDUCATION

The University of Texas School of Law, Austin, Texas
Juris Doctor, May 2023
GPA: 3.66 (actual rank not available, est. top 25-30%)

- Chief Symposium Editor, THE REVIEW OF LITIGATION, Vol. 42, 2022 – 2023
- Teaching/Research Assistant, Professor Lawrence G. Sager (Supreme Court Seminar)
- Pro Bono "Torchbearer" Award, Mithoff Pro Bono Program (over 200 pro bono hours)
- Chief Justice Joe R. Greenhill Scholar

University of Arkansas, Fulbright College of Arts and Sciences, Fayetteville, Arkansas
B.A. in Political Science, *cum laude*, May 2019

- Senior Thesis: "*The Developing Impact of Twitter on Presidential Campaign Discourse"*
- *Pi Sigma Alpha*, Political Science Honor Society
- Dean's List, 2017 – 2019

PUBLICATIONS

Protecting the Most Vulnerable: Pursuing a Clear and Functional Equal Protection Framework for Transgender Youth, 28 TEX. J. C.L. & C.R. (forthcoming 2023).

- Presenter, TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS 2023 Symposium: *Legal Issues Impacting the LGBTQIA+ Community*.

Note, *Standing for the Lorax: Augmenting an Ill-Suited Standing Doctrine to Allow for Justice in Novel Climate Change Litigation*, 41 REV. OF LITIG. 409 (2022).

- Winner, Best Student Note Award, THE REVIEW OF LITIGATION, Vol. 41.

EXPERIENCE

The Honorable Debra H. Lehrmann, Senior Associate Justice
The Supreme Court of Texas, Austin, Texas
Judicial Law Clerk, September 2023 – 2024 (expected)

Capital Defense Clinic, University of Texas School of Law, Austin, Texas
Advanced Student Attorney, August 2022 – May 2023

- Structured and wrote sections of a Fifth Circuit appeal and cert petition.
- Interviewed jurors and drafted points of error for habeas petitions and direct appeals.

Pillsbury Winthrop Shaw & Pittman LLP, Austin, Texas
Summer Associate, May 2022 – July 2022

- Researched and drafted briefs on antitrust and patent issues in district and circuit courts.
- Supported attorneys in pro bono representation with the Mid-Atlantic Innocence Project.

The Honorable Tony Davis, U.S. Bankruptcy Judge
U.S. Bankruptcy Court for the Western District of Texas, Austin, Texas
Judicial Intern, July 2021 – August 2021

- Drafted bench memos, orders, judgments, and an opinion.
- Analyzed confirmation requirements under the newly amended Chapter 11 proceedings.

INTERESTS

- Playing pick-up basketball, writing music and poetry, and studying theology.

Prepared on May 6th, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

PROGRAM: Juris Doctor

OFFICIAL NAME: COOK, WILLIAM SETH
PREFERRED NAME: Cook, William S.

DEGREE: in progress seeking JD TOT HRS: 86.0 CUM GPA: 3.66

FAL 2020	423	CRIMINAL LAW I		4.0	A-	JEL
	427	TORTS		4.0	B+	TOM
	531	PROPERTY-WB		5.0	C+	JSD
	332R	LEGAL ANALYSIS AND COMM		3.0	B+	ECD
SPR 2021	433	CIVIL PROCEDURE-WB		4.0	B+	RGB
	434	CONSTITUTIONAL LAW I-WB		4.0	A-	LGS
	421	CONTRACTS		4.0	A	OB
	232S	PERSUASIVE WRTG AND ADV		2.0	B+	SJP
FAL 2021	397S	SMNR: COLLOQ CMPLX LITI		3.0	A	LAB
	387W	APPELLATE ADVOCACY		3.0	A-	RMR
	381C	CNST LAW II: RACE/SEX D		3.0	A	JMS
	392P	ANTITRUST		3.0	A	ALW
	397S	SMNR: ENV IMPCT ENRGY D		3.0	A+	DGN
SPR 2022	397S	SMNR: MERCY		3.0	A-	LK
	483	EVIDENCE		4.0	A-	SJG
	385	PROFESSIONAL RESPONSIBI		3.0	A-	JSD
	386V	PATENT LITIGATION		3.0	B+	CJH
	397L	DIRECTED RESEARCH AND S		3.0	A	LGS
FAL 2022	383F	CAPITAL PUNISHMENT		3.0	A	JMS
	284W	ADV LGL WR: APPEALS	P/F	2.0	CR	KO
	497C	CLINIC: CAPITAL PUNISHM	P/F	4.0	CR	TJP
	393H	CNSMR PROT: DECPT TRD P		3.0	A	FAD
SPR 2023	383G	CAPITAL PUNISHMENT: ADV		3.0	A	JM
	284Q	APPELLATE CLERKSHIP WRI	P/F	2.0	CR	JFG
	486	FEDERAL COURTS		4.0	A-	SIV
	397S	SMNR: SUPREME COURT		3.0	A	LGS
	197W	CLINIC, ADVANCED	P/F	1.0	CR	JM

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2020	16.0	16.0	16.0	3.09
SPR 2021	30.0	30.0	30.0	3.61
FAL 2021	45.0	45.0	45.0	4.00
SPR 2022	61.0	61.0	61.0	3.68
FAL 2022	73.0	73.0	67.0	4.00
SPR 2023	86.0	86.0	77.0	3.88

06-02-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter in support of Seth Cook's application for a clerkship in your chambers. As a former federal district court clerk, I recognize the intellectual skill and work ethic required to successfully aid your duties behind the bench and am happy to recommend a candidate that I believe would be a great asset to your office.

I know Seth from his time as a summer associate in the Austin office of my law firm, Pillsbury Winthrop Shaw Pittman LLP. I was assigned to be Seth's mentor at the firm and was thus able to gain a first-hand glimpse into his dedication, legal instincts, and his overall curiosity. On the basis of my work with Seth, and having observed the work he did for others in my office, I am confident he will make an excellent law clerk.

As a summer associate, Seth's work product was impeccable. His research was thorough, his analysis balanced and well-reasoned, and his writing crisp, to the point, and easy to read. One assignment that readily comes to mind and reflects these qualities was based on a request for research and guidance concerning a particularly unclear area of Texas state law pertaining to the precise contours of contracts that call for successive performance and that are arguably indefinite in duration. In light of the lack of clarity in Texas law, and the contract Seth was asked to analyze, numerous questions arose. When a contract that calls for successive performance by one party, but does not set forth a particular time for the performance to end, is the contract indefinite as a matter of law? Conversely, where the contract does not have a specified end date, but there is an ascertainable event which both parties can identify that determines the contract's duration, even if that event might never occur, does that render the contract definite? What if the contract merely states that a non-breaching party can terminate the contract if the other party is in breach and fails to cure? Does that render an otherwise indefinite contract definite? Or are such events not of the kind that transform a contract of indefinite duration into one of definite duration because they simply state a fundamental principle of contract law, i.e., that a party may terminate an agreement if the counter-party materially breaches and fails to cure? And what if the contract is found to be indefinite? Does it become terminable at will or is the court to impute a reasonable time for performance?

These questions were difficult ones, with no simple answers and little by way of consistent guiding precedent. The Texas Supreme Court had only spoken to the issue on a scant few occasions, and never in the context of purely private contracting parties – all pertinent cases from the state supreme court involved contracts for government service, which often involved extra-contractual considerations, such as those called for by statute or public policy concerns typically absent from the private party context. Seth responded quickly with a well-researched, lengthy analysis that answered all questions posed, and more importantly, reflected hard work and thoughtful reasoning. It was clear that, instead of reaching a conclusion at the outset and working backwards to support his conclusion, Seth took a great deal of time to digest the pertinent authority, consider the facts and surrounding equitable circumstances, and present various potential applications of the law. After he submitted his work, we asked Seth to turn around and begin drafting a motion for summary judgment based on his findings. That is, as a summer associate, we were glad to leverage Seth's work directly into a filing with the court, and I trust he would perform similarly for your chambers.

From this assignment and various others, I learned that Seth displays a very strong ability to quickly grasp and work with legal doctrine. I was particularly impressed with his ability to delve into the details of a particular issue, quickly digest the facts and law, and clearly and succinctly produce a summary and reasoned application of the controlling and persuasive authority, all while preserving a strong sense of the context from which the matter arose. He clearly has the tools to become an exceptionally skilled law clerk and lawyer. Of course, none of this should come as a surprise, as Seth's academic record is excellent. I suspect his skills will only sharpen with the experience he will receive while clerking for Texas Supreme Court Justice Debra Lehrmann upon his graduation.

On a more personal note, having spent a significant amount of time with Seth, I can confidently say that—above all else—he is an individual that earnestly cares for his friends and colleagues. He was very much the "glue" of his summer class, as he repeatedly helped his fellow summer associates complete tasks in the short time frame allotted when they were overworked. Seth's inclination to care for those around him and volunteer to aid their work efforts is a trait that will surely be of great value in light of the complex cases and increasingly immense workload born by your chambers.

In short, I recommend Seth to you enthusiastically and without reservation. If I can be of any further assistance in your review of his candidacy, please feel free to contact me.

Very truly yours,

Ben Bernell, Partner
Pillsbury Winthrop Shaw Pittman LLP

Ben Bernell - ben.bernell@pillsburylaw.com - 5125809631

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Mr. Cook is applying for a clerkship in your chambers, and I recommend him with tremendous enthusiasm. Mr. Cook was a student in two of my upper-level constitutional law courses, “Race, Sex, and the Constitution” (Fall of 2021), and “Capital Punishment” (Fall of 2022). The race and sex course focuses on constitutional (and, to a lesser extent, statutory) approaches to race and sex discrimination. The class covers a wide range of materials, including historical, doctrinal, and theoretical frameworks. Although the class was somewhat large (about 40 students), I was able to get to know Mr. Cook well because he was such a strong participant in class discussions, and he regularly attended office hours. He displayed a deep understanding of the complicated theoretical and practical issues surrounding discrimination law, and his comments reflected both his intellectual curiosity and his sophisticated engagement of the course material. Given his consistently positive contributions, I was unsurprised by Mr. Cook’s outstanding final exam. His exam was one of the very best in the class, reflecting a clear command of the course material. The following year, Mr. Cook took my capital punishment course focusing primarily on the extensive federal constitutional regulation of the American death penalty. Again, Mr. Cook stood out as a truly outstanding student, one of the best participants in a large (60 person) class. He had a knack for locating the difficult issues in the material and he consistently offered perceptive critiques of prevailing doctrine. Mr. Cook also demonstrated an impressive command of the difficult statutory material in the course – the elaborate doctrines governing the availability of federal habeas corpus review of state criminal convictions. His exam was truly outstanding, reflecting his genuine mastery of the highly technical material as well as a deep understanding of the broader issues at stake in capital litigation.

Apart from our interactions around these classes, I was able to get to know Mr. Cook very well. He participated in our capital punishment clinic, which involves student in the representation of death-sentenced inmates on Texas’s death row. My colleagues uniformly viewed Mr. Cook as a particularly able and committed student in the clinic’s work. Mr. Cook also serves as a research assistant for my colleague Larry Sager (former Dean of the Law School), and I’ve found that he, too, regards Mr. Cook as an exceptional student and research assistant (Mr. Cook is currently enrolled in Professor Sager’s course on the U.S. Supreme Court, and I believe Mr. Cook helped select the cases from this Court’s Term which provide the focus for this semester’s seminar).

Mr. Cook stands out as one of our best clerkship candidates. Apart from his tremendous academic achievement, he has had an unusual level of experience and interest in high-powered litigation. In addition to our capital punishment clinic, Mr. Cook served as an intern for Judge Davis in the bankruptcy court; after graduation, Mr. Cook will serve as a law clerk for Justice Lehrmann on the Texas Supreme Court.

I’ve spent some time discussing Mr. Cook’s career aspirations and he seems interested in pursuing post-conviction capital defense, perhaps in one of the Capital Habeas Units housed in the various Federal Public Defender offices. He will bring a wealth of knowledge about criminal justice issues and federal habeas to a federal clerkship, and the experience of a federal clerkship will greatly advance his training for a position at one of the federal CHUs.

On the more personal side, Mr. Cook is a delight. He is an unusually mature student who wants to use his legal training to support individuals in great need. He is bright, hardworking, and very talented. He also loves to engage in wide-ranging conversations about legal theory and legal practice. He seems to have a great appreciation of the complexity of legal interpretation while maintaining a healthy grounding in the details of legal practice. He would be a welcome addition to any chambers. I count him as one of the true stars of the current class.

Sincerely,

Jordan M. Steiker
Judge Robert M. Parker Endowed Chair in Law
Co-Director, Capital Punishment Center
The University of Texas School of Law

Jordan Steiker - jsteiker@law.utexas.edu - 512-232-1346

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing in warm support of Seth Cook, who has applied to be your law clerk. Seth's formal name is William, but I and others in the UT Law environment have known him as Seth; so I will continue with that name.

I first encountered Seth in my Con Law 1 class, which was on-line on account of Covid. After several post-course meetings, I asked him to act as one of my research assistants. In this past semester I directed a research project of his, on the constitutional approach to discrimination against members of the LGBTQ community. So I have seen Seth and his work in a variety of contexts.

For all of that, I am going to begin by referencing Seth's transcript and CV, because they suggest things about him that are fully borne out by my experience. Seth's grades begin a bit flat, and then swoop up to excellence. And Seth's CV paints a rough sketch of a person with political interests and concerns, but with a willingness and commitment to work hard towards his professional and political goals. This picture of a hard worker, digging at his projects, and succeeding brilliantly, tracks my experience with Seth perfectly.

Seth is intellectually gifted but modest and anxious to learn. Law school has been a tonic for him. As his studies have progressed, he has grown more sophisticated and confident. His directed research project serves as a good example of his evolving strength, underlying diligence, and ability to produce really good work. After each draft of his essay, Seth and I would talk. He listened and learned. The successive draft would not parrot my thoughts at all, but would reflect what Seth had taken from our conversation, and the result would be a significant improvement. In the end, the result was a really fine essay. But more importantly, for purposes of my being able to recommend him to you, the process reflects the combination of his intelligence and his hunger to excel.

I have enjoyed the benefits of Seth's research on projects of my own, and can speak directly to his energy and ability. I am confident that Seth will be a terrific law clerk. I am very happy to be able to recommend him to you.

Please feel free to contact me if I can be of any further assistance.

With sincere regards,

Lawrence G. Sager
Alice Jane Drysdale Sheffield Regents Chair
The University of Texas at Austin

Lawrence Sager - lsager@law.utexas.edu - 512-232-1322

William "Seth" Cook
wscook@utexas.edu | 7004 Colony Park Dr. Austin, Texas 78724 | (817) 713-0574

Writing Sample

This writing sample is an excerpt from an appellant's brief written for an advanced legal writing class at the University of Texas School of Law. This version of the brief was written without any editing or commentary from other students or the professor.

I was assigned to represent the appellant, a visually impaired history professor named Howard Bekavac. When Professor Bekavac sought to order from a web-based catering company for his students, his screen reading software was unable to vocalize the website's menu. Appellee, Klingenmaier's BBQ4U, designed their website menu with exclusively images which functionally prohibited the website from being accessible to the visually impaired. The district court ruled that websites did not qualify as public accommodations under Title III of the Americans with Disabilities Act as a matter of first impression and granted summary judgment for the appellee. The sole issue on appeal is whether a web-based business without a nexus to a physical location qualified as a public accommodation under Title III of the ADA.

Argument

The Americans with Disabilities Act ("ADA") provides a statutory basis for persons with disabilities to vindicate their equal standing in society. Appellee—a catering corporation—contends that because it does not have a brick-and-mortar store, the ADA cannot make it accommodate persons with visual disabilities. True, the ADA does not expressly state that websites are "places of public accommodation" under § 42 U.S.C. 12182(a). However, the breadth of §§ 12182(a) and 12181(b)'s language and the underlying purpose of the ADA demonstrate that "places of public accommodation" do include web-based companies.

I. THE PLAIN LANGUAGE OF TITLE III OF THE ADA LOGICALLY INCLUDES WEB-BASED BUSINESSES AS PLACES OF PUBLIC ACCOMMODATION.

The language of § 12182 does not expressly exclude web-based businesses from the ADA's requirements. The statute states the purpose of Title III broadly:

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation."

§ 42 U.S.C. 12182(a) (emphasis added). This provision plainly states the ADA's intent and the key policies it establishes. Section 12181(7), the provision defining the term public accommodations, lists several examples that any reasonable reader would recognize as *not* primarily in-person services. For example, the inclusion of travel services and insurance sales—intangible goods and services historically rendered over the phone—substantially calls into question the district court's assertion that

the statute requires a physical nexus. Had the authors of Title III intended public accommodations to mean only physical, in-person services, it would have been far more logical to simply say that. Contradictorily, the district court's interpretation reads a physical nexus requirement by negative implication from a non-exhaustive list of examples—only *some* of which are primarily in-person services.

Also counseling against the district court's interpretation is the language of § 12181(7)(B)—the clause most relevant to this suit. Examples include "restaurants, bars, or *other food services establishments*." § 12181(7)(B). Had Congress intended to include only brick-and-mortar restaurants and bars, it would have refrained from adding an additional phrase expanding the traditional meaning of those terms.

A. The text is broad enough to include web-based businesses.

The term "place of public accommodation" as used and defined in §§ 12182(a) & 12181(7) and when interpreted contextually, includes web-based businesses.

When the legal issue is one of statutory construction, the "court must start with the statute's words." *Sanzone v. Mercy Health*, 954 F.3d 1031, 1040 (8th Cir. 2020). However, "the definitions of words in isolation. . .are not necessarily controlling in statutory construction." *Iverson v. United States*, 973 F.3d 843, 847 (8th Cir. 2020). Further, the "interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.* (citing *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 486 (2006)). Accordingly, the definition of the term "public accommodation" must be construed in the very same contextual and purposeful way.

First, we start with the plain language. An "accommodation" is commonly defined as "something supplied for convenience or to satisfy a need: such as lodging, food, and services or traveling space and related services." Merriam-Webster's Dictionary (12th ed. 2019). This definition tracks well with the examples articulated in § 12181(7): lodging ("an inn, hotel, motel or other place of lodging"), food ("restaurant, bar, or other establishment serving food or drink"), services or traveling space ("a terminal, depot, or other station"). § 12181(7)(a)-(g). Because the statute has numerous other enumerated examples, the statutory definition is even *more* expansive than we find in the dictionary.

Within this expansive definition is "a restaurant, bar, *or other establishment serving food or drink."* § 12181(7)(B). The disjunctive "or" implies that while our traditional understandings of restaurants and bars are plainly included, "other establishment[s] serving food or drink"—which may not fall into traditional archetypes of restaurants and bars—are *also* included. It would be illogical to assume Congress only intended "other establishment[s] serving food or drink" to refer to the same traditional understanding of physical restaurants and bars when it included another clause phrased differently and attached by a disjunctive "or."

While logic counsels against this reading, so does Supreme Court precedent on statutory interpretation. Courts are required to "always turn first to one, cardinal canon before all others…courts must presume that a legislature says in a statute what it means and means in the statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When giving meaning to words and phrases, the Court

has said "it is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche,* 348 U.S. 528, 538–539 (1955); *see also Williams v. Taylor,* 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman,* 101 U.S. 112, 115 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"). If "other establishment serving food or drink" simply refers to in-person physical restaurants and bars, it is superfluous.

Under this cardinal principle against superfluidity, this Court is compelled to interpret "other establishment[s] serving food or drink" to include establishments other than just archetypal concepts of restaurants. One example of another establishment could be a fully web-based catering company. Appellee is unquestionably a food service establishment. However, it obviously does not fit into the traditional concept of a restaurant or bar. Appellee would argue that means it should be exempted from the requirements of § 12182(a). This argument by definition, however, relies on an interpretation rendering "other establishment[s] serving food or drink" utterly superfluous. Under the Court's cardinal principles of statutory interpretation, courts "should be reluctant to treat statutory terms as surplusage in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbit v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995).

B. Intra-textual analysis also reveals the contemplation of non-tangible goods and services.

Section 12181(7)(F) includes—as an example of a public accommodation—the rendering of a "travel service" and services of an "insurance office." While the Eighth Circuit has not specifically interpreted "public accommodation" in this light, lower courts within the Eighth Circuit have addressed § 12182(a) in contextually similar ways. *See Dalton v. Kwik Trip, Inc.,* 2021 U.S. Dist. LEXIS 191967, at *8 (D. Minn. Oct. 5, 2021) (supporting the proposition that the lack of specific regulations regarding website accessibility does not eliminate the obligation to comply with the ADA). Notably, several circuits have found § 12182(a) to apply to web-based services.

The Seventh Circuit read § 12182(a) with a focus on the service rendered and deemed the language to include web-based insurance services. *Morgan v. Joint Admin. Bd., Retirement Plan of Pillsbury Co. and Am. Federation*, 268 F.3d 456, 459 (7th Cir. 2001); *see also Doe v. Mutual of Omaha Ins. Co.*, 170 F.3d 557, 558-59 (7th Cir. 1999) (A "…travel agency, theater, website, or other facility (whether in physical space or in electronic space)…that is open to the public cannot exclude disabled persons from…using the facility in the same way non-disabled people do.").

Specifically, the Seventh Circuit's analysis first looked at whether an insurance company could refuse to sell an insurance policy to visually impaired persons. *Doe*, 170 F.3d at 557. While the ADA could not compel changes to the underlying policy on visual disability, it barred the company from refusing to sell the policy simply because the customer was blind. *Id.* Later reaffirming this reasoning, the Seventh Circuit noted that since the selling of insurance services was explicitly enumerated, it did not matter whether the services were sold in person or solely

online. *Morgan*, 268 F.3d at 459 ("The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the goods be offered to the public.").

Similarly, the First Circuit held that "Congress clearly contemplated that service establishments include providers of services which do not require a person to physically enter an actual physical structure." *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994). The court reasoned that it would be "irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same service over the telephone or by mail are not." *Id.* The First Circuit recognized that exempting an entire broad category of businesses making sales by phone or mail would produce absurd results and frustrate Congress's intent that "individuals with disabilities enjoy the goods, services…available indiscriminately to other members of the public." *Id.* As applicable as that was to mail and phone sales in 1994, the recognition of disability rights in non-physical spaces is much more vital in a society that conducts 49% of all sales in an online format.

While the Second Circuit has not explicitly held that § 12182(a) applies to websites, it has recognized that "insurance services" is defined by what it provides, not by where it is located. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31 (2d Cir. 1999). The court rejected the defendant's argument that "Congress intended the statute to ensure that the disabled have physical access to the facilities of insurance providers, not to prohibit discrimination against the disabled in insurance

underwriting." *Id.* The court stated that this contradicted the plain purpose of the ADA. *Id.* The Second Circuit's reasoning highlighted the varied examples found in § 12181(7)'s lists of public accommodations, and the emphasis placed on access to the services they render and not where or how those services are rendered. *Pallozzi*, 198 F.3d at 32.

Additionally, the distinction that the ADA makes between "places of public accommodation" and the term "facilities" when expressly referring to physical places is significant. *See* 42 U.S.C. § 12183. When the drafters of the ADA wanted to ensure their guidance was applying to exclusively physical places, they used a different word. *See Martinez v. Gutsy LLC*, No. 22-CV-409, U.S. Dist. LEXIS 214830, at *14 (E.D.N.Y. Nov. 29, 2022) ("This change in word choice—from "public accommodations" to "facilities"—when intending to discuss a physical space, further bolsters a textual interpretation of § 12181, in describing the covered entities under Title III, as having been concerned with entities' functions rather than their physical spaces.").

This services-focused view of the statutory language is directly applicable here. It is irrelevant whether the food or drink is ordered from the store, in-person, or online; what matters is that the food service is offered to the public in general and yet remains inaccessible to persons with a visual disability. The shared characteristic connect each of the enumerated examples is a similarity in service, not a physical location. *See* Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, 21 WIS. L. REV. 719, 766 (2021) ("The statutory focus is on the entity's function: serving food, creating space for the

public to gather, offering entertainment, providing education, offering banking or transportation services."). Because the statute explicitly enumerates food services, this Court should similarly hold that "the site of sale is irrelevant" and that "what matters is that the goods [were] offered to the public." *Morgan*, 268 F.3d at 459.

Intra-textual analysis reveals that the critical value of § 12182(a) is protecting equal access to the "full and equal enjoyment of" goods and services of public accommodations and not merely physical access to in-person establishments. Thus, this Court should recognize what the Seventh, First, and Second Circuits have made clear: the language of § 12182(a) includes exclusively web-based goods and services.

II. LEGISLATIVE HISTORY AND DOJ GUIDANCE REVEAL THAT WEB-BASED BUSINESSES ARE PUBLIC ACCOMMODATIONS UNDER TITLE III.

The plain language reading of 42 U.S.C. § 12182(a) does not logically exclude web-based businesses from its definition of public accommodation, and the thoroughly articulated purpose of the ADA supports this reading. Numerous courts have fully fleshed out the legislative history and intra-textual policy goals, finding the refusal to include web-based businesses as public accommodation to lead to absurd results. This Court should recognize this history and purpose and interpret the language in a way that does not doom Title III to technological obsolescence.

A. The legislative history of the ADA compels a "liberal construction" of the enumerated public accommodations.

Congress enacted the ADA to "remedy widespread discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). Specifically, Congress found that "historically, society has tended to isolate and segregate

individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* at 674-75 (citing 42 U.S.C. § 12101(a)(2)).

This pervasive and multi-faceted discrimination found its way into all areas of society in the form of "outright intentional exclusion" and the "failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101(a)(5). These practices revealed a "compelling need for a clear and comprehensive national mandate to eliminate discrimination against disabled individuals and to integrate them 'into the economic and social mainstream of American life.'" *PGA Tour*, 532 U.S. at 675 (citing S. Rep. No. 101–116, p. 20 (1989)).

Notably, web-based businesses like the appellee did not exist in 1990 when § 12182 was enacted. However, "one of the Act's 'most impressive strengths' has been identified as its 'comprehensive character'" and broad mandate to "remedy widespread discrimination against disabled individuals." *Id.* (citing *Hearings on S. 933 Before the S. Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess., 197 (1989) (statement of Attorney General Thornburgh)).

In line with this "broad mandate," public accommodation is defined in "terms of 12 extensive categories, which the legislative history indicates should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the non-disabled." *Id.* at 676-77 (citing S. Rep. No. 101–116, P. 59 (1989); H.R. Rep. No. 101–485, pt. 2, P. 100 (1990), U.S. Code Cong. &

Admin. News 1990, pt. 2, at pp. 303, 382–83.). Giving § 12182(a) this liberal construction, "place of public accommodation" followed by the extensive list of examples, should not be construed to exclude web-based businesses.

Further confirming this interpretive intent, explicit in the legislative history is the objective that the statute be applied in stride with technological development. Specifically, the "Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, *should keep pace with the rapidly changing technology of the times*." H.R. Rep. No. 101-485, at 108 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 391 (emphasis added).

B. The DOJ's Guidance on ADA Interpretation explicitly includes web-based goods and services.

Consistent with Congress's intent for the ADA to keep pace with technology, the DOJ has offered guidance on the web-based provision of goods and services. The DOJ has "consistently taken the position that the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web." U.S. Dep't of Just., Guidance on Web Accessibility and the ADA (Mar. 18, 2022).

While the DOJ guidance is not binding on this court, the DOJ's expertise in interpreting federal statutes and recognition of public accommodations as "any business open to the public" is of significant import. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("A guidance document . . . is entitled to deference depending upon the thoroughness evident in its consideration, the validity of its reasoning, its

consistency with earlier and later pronouncements, and all those factors which give it power to persuade.").

Appellee's proposed construction of Title III would limit this unquestionably expansive undertaking to a subset of public accommodations whose market power is shrinking by the day. This construction contradicts the explicit instructions found in the legislative history announcing the ADA and the rights it sought to protect.

III. THE DISTRICT COURT'S INTERPRETATION WOULD PLAINLY THWART THE PURPOSE OF THE ADA.

The legislative history reveals the unambiguous purpose of Title III—the law protects persons with disabilities from marginalization, segregation, and animus. With this purpose in mind, the limitation of "public accommodation" to only in-person establishments would render the entire statute technologically obsolete and give modern businesses free rein to discriminate at will. This interpretation renders the statute contrary to its purpose and makes the ADA itself discriminatory. The facts presented here are sufficient to show the far-reaching harm of this interpretation.

First, this narrower interpretation allows modern web-based businesses to avoid ADA compliance by simply shifting their customer interaction entirely online. Prof. Bekavac does not assert that the Appellee designed its website out of animosity toward the blind community. However, if the Appellee allowed food to be picked up from the property where the smoker was located, there would be *no question* about whether it was a public accommodation. Let us consider if this had been the case. Had the Appellee maintained the same website but allowed customers to pick up their orders from the smoker property or the kitchen where she made the sides, there

would be an unquestionable nexus to physical property. Had Prof. Bekavac brought this same claim, there would have been immediate relief.

Under the district court's interpretation of Title III, however, the Appellee could skirt its duty to respect the professor's civil rights simply by not allowing customers to pick up their food anymore. This arbitrary and logistical choice would allow the Appellee to discriminate against the blind for the rest of its existence, insulated from any challenge. This example reveals how arbitrary it would be in this modern day—where almost every business providing goods or services has a website performing significant portions of its sales—to exempt web-based businesses from their obligation to respect the civil rights of persons with disabilities.

Second, this interpretation of "public accommodations" makes Title III itself discriminatory on its face. By vindicating the rights of the disabled in physical establishments only, Title III tells persons with disabilities preventing them from engaging in in-person commerce that their disability is too severe for their rights to be protected. If Prof. Bekavac could not get around independently and instead chose to purchase his groceries from a web-based meal service, he would be functionally deemed without rights to vindicate. Additionally, in the era of Covid-19, those who may be severely immunocompromised and are encouraged to avoid in-person gatherings and crowded stores would be cast aside. This Court cannot recognize an application of the ADA that creates a ranking among people with disabilities deeming some of them *too disabled* to protect.

The district court's interpretation of "public accommodations" to solely include physical locations fails to recognize the purpose of Title III. Any party that wanted to avoid ADA compliance could move its customer interaction online—an increasingly common choice as we recover from a global pandemic. This scenario would render illusory the civil rights of the disabled that the ADA claims to vindicate and allow businesses to sidestep even the most reasonable regulations—either out of animus or laziness.

Conclusion

Title III of the ADA promises those with disabilities the full and equal enjoyment of the goods, services, and privileges of public accommodations. As we continue developing a technologically advanced and online society, it cannot be the case that a company conducting its business solely online renders Title III an illusory promise of civil rights for Prof. Bekavac.

For these reasons, this Court should agree with the First, Second, and Seventh Circuits that "public accommodations" includes web-based businesses, reverse the lower court's grant of summary judgment, and remand for further proceedings.

Applicant Details

First Name	**Julia**
Last Name	**Crain**
Citizenship Status	**U. S. Citizen**
Email Address	**juliacrain@uchicago.edu**
Address	**Address** Street **5454 S Shore Dr, Apt 522** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**3022870484**

Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Strauss, David
d-strauss@uchicago.edu
Fahey, Bridget
bfahey@uchicago.edu
720-272-0844
Lakier, Genevieve
glakier@uchicago.edu
773-702-9494

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year student at The University of Chicago Law School applying for a clerkship in your chambers for the 2024-2025 term. I am particularly eager to clerk in Philadelphia, as both of my brothers live in the city, and my parents, grandmother, and sister live nearby in Wilmington, DE.

As a crisis counselor for the Trevor Project, the leading national suicide prevention hotline for LGBTQ youth, I consoled a gay teenager whose parents drove him across state lines for the pseudoscientific but legal conversion therapy they mandated; a transgender student whose school kicked her off the track team once she "came out" as transgender; a middle schooler whose teachers ignored her classmates' homophobic bullying. I came to law school to become a lawyer-advocate on their behalf. Clerking will arm me with the tools and perspective to litigate for LGBTQ rights.

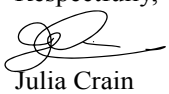
My writing and research skills will make for a strong addition to your chambers.

Writing was the focal point of my pre-law school employment. At Sotheby's, I drafted essays on the highest value paintings in our contemporary art auctions. At The Metropolitan Museum of Art, I proofread and edited exhibition catalogues. I maintain my connection to literature and the visual arts by editing *Pique*, a magazine I founded to celebrate queer women artists. Thus far, I have commissioned and published twenty-three short stories and essays.

My legal research experience cuts across a variety of substantive areas. In preparing for trial with the Abrams Environmental Law Clinic, I dove into the IL Rules of Evidence and parsed through complicated agency regulations. In drafting an Eleventh Circuit brief for a client of the Federal Defenders Program in Montgomery, AL, I analyzed Fourth Amendment jurisprudence. In assisting Professor Bridget Fahey, I navigated scholarship on constitutional theory. I will continue to develop my legal research skills this summer as a Summer Associate at Sullivan & Cromwell LLP and a legal intern at Lambda Legal.

My resume, writing sample, transcript, and letters of recommendation from Professors Lakier, Strauss, and Fahey are enclosed in my OSCAR application. If there is any other information that would be helpful to you, please do not hesitate to let me know. Thank you for your consideration.

Respectfully,



Julia Crain

Julia Crain
5454 S. Shore Drive, Chicago, IL 60615 | (302) 287-0484 | juliacrain@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
J.D. Candidate, June 2024
- Activities: Research Assistant, Professor Bridget Fahey; OutLaw, President; Abrams Environmental Law Clinic, Student Attorney; Hinton Moot Court; Jewish Law Students Association, Member

Barnard College, Columbia University, New York, NY
B.A. in Art History with a Minor in History, May 2018
- Honors: Summa Cum Laude, Virginia B. Wright Prize in Art History
- Activities: *Columbia Daily Spectator*, Editorial Board; Columbia Mock Trial; *The Current*, Literary & Arts Editor

AWARDS & HONORS

Rhodes Scholarship and Marshall Scholarship, Washington, DC, *Finalist*, November 2017
- Nominated by Barnard College and selected as a finalist for both the Rhodes and Marshall Scholarships

EXPERIENCE

Sullivan & Cromwell LLP, New York, NY, *Summer Associate*, start date: June 2023

Lambda Legal Defense and Education Fund, Chicago, IL, *Legal Intern*, start date: August 2023

Middle District of Alabama Federal Defenders Program, Montgomery, AL, *Legal Intern*, June-August 2022
- Drafted a reply brief for the Eleventh Circuit and memoranda for attorneys on capital habeas issues

The Trevor Project, New York, NY, *Crisis Worker*, September 2020-May 2021
- Served as a counselor for the Trevor Lifeline, the leading national suicide prevention hotline for LGBTQ youth
- Volunteered 120 hours for the Trevor Lifeline between January 2019 and September 2020 (prior to employment)

Sotheby's, New York, NY, *Associate Cataloguer (Contemporary Art)* and *Trainee*, September 2018-April 2020
- Wrote essays on top lots, liaised with artist estates and galleries to research provenance and confirm authenticity, acquired copyright for images in sale catalogues, and coordinated restoration of art with conservators

The Metropolitan Museum of Art, New York, NY, *Publications Intern*, Summer 2017
- Edited and proofread exhibition catalogues and didactics
- Developed and led four themed tours of the museum for visitors after completing a training course with Met educators

The Smithsonian American Art Museum, Washington, DC, *Public Programs Intern*, Summer 2016
- Planned public programs ranging from academic symposia, artist gallery talks, to musical performances at the museum

Friedlander & Gorris, P.A., Wilmington, DE, *Summer Intern*, Summer 2015
- Provided discovery research for senior attorneys and edited a brief for the Delaware Supreme Court

SERVICE & ACTIVITIES

PIQUE, New York, NY, *Founding Editor*, January 2020-Present
- Founded *Pique*, an independent magazine that celebrates the art and cultural contributions of queer women
- Produced the print and digital issues by commissioning 23 short stories and essays, acquiring an ISSN through the Library of Congress, and overseeing a team of editors, graphic designers, computer scientists, and fine art printers

Nightline, New York, NY, *Peer Listener* and *Training Coordinator*, September 2015-May 2018
- Served as a staff member of Barnard and Columbia's anonymous peer listening hotline
- Taught 25 students in a semester-long course on active listening and mental health crisis intervention

Anti-Sexual Violence Advocacy, New York, NY, *Advocate*, September 2014-December 2015
- Worked with Governor Andrew Cuomo's staff on developing Enough Is Enough, legislation aimed at reducing college sexual assault, and lobbied legislators in Albany to pass the legislation; it passed in July 2015
- Guest lecturer at Katherine Franke's Columbia Law School course and Michele Dauber's traveling Stanford seminar

LANGUAGES & INTERESTS

Italian (intermediate proficiency) | Scuba Diving (holds dual certification) | Classical Ballet (19 years)

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Julia E Crain
Student ID: 12329078

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Program Status:Active in Program
J.D. in Law

External Education

Barnard College-Columbia University
New York, New York
Bachelor of Arts 2018

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	176
LAWS	30211	Civil Procedure Diane Wood	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	175
LAWS	30711	Legal Research and Writing Daniel Wilf-Townsend	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	173
LAWS	30411	Property Thomas Gallanis Jr	4	4	179
LAWS	30511	Contracts Bridget Fahey	4	4	177
LAWS	30711	Legal Research and Writing Daniel Wilf-Townsend	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Daniel Wilf-Townsend	2	2	181
LAWS	30713	Transactional Lawyering Joan Neal	3	3	176
LAWS	43227	Race and Criminal Justice Policy Sonja Starr	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	176
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	175

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Geoffrey Stone	3	3	178
LAWS	42301	Business Organizations Anthony Casey	3	3	175
LAWS	45801	Copyright Randal Picker	3	3	177
LAWS	53263	Art Law William M Landes Anthony Hirschel	3	0	

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	177
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	179
LAWS	53365	LGBT Law Camilla Taylor	3	0	
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	2	0	

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40501	Constitutional Law V: Freedom of Religion Mary Anne Case	3	0	
LAWS	43313	Fair Housing Lee Fennell	3	3	177
LAWS	53469	Advanced First Amendment Law Genevieve Lakier	3	0	
LAWS	53493	Topics in First Amendment Law and New Technologies Eugene Volokh	1	1	180
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	1	0	

Send To: Julia Crain
5454 S Shore Dr
Chicago, IL
60615-5919

End of University of Chicago Law School

Date Issued: 06/10/2023

Page 1 of 1

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://esl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

Professor David A. Strauss
Gerald Ratner Distinguished Service Professor of Law
The University of Chicago Law School
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June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Julia Crain, who has just finished her second year here, is an excellent student and a terrific person. She took my class in Constitutional Law, and I often talked with her outside of class about the material, and about other subjects as well. Julia was the president of OutLaw, the student organization dedicated to supporting LGBTQ rights; I spoke at an OutLaw event, so I worked with Julia in that capacity as well. Her intelligence and thoughtfulness impressed me every time. She is a friendly, outgoing person who seems to be well-liked by everyone. I think she would be a first-rate law clerk, in every respect.

Julia was a standout in class discussions in the Constitutional Law class. Her contributions were consistently smart and thoughtful. She never over-simplified issues, and she showed a very sophisticated understanding of how the law develops. I remember one instance in particular: Julia, in an oral contribution in class, essentially rewrote an important Supreme Court decision to place it on more solid ground.

The decision was Katzenbach v. McClung, which of course upheld the public accommodations provisions of the Civil Rights Act of 1964 against a claim that they exceeded Congress's power under the Commerce Clause. The claim was brought by the proprietor of a diner that catered to few interstate travelers but served food that had moved in interstate commerce. The opinion of the Court justified the statute on the ground that racial discrimination by the diner diminished the amount of food that moved in interstate commerce.

Julia argued, in class, that a different justification for decision would have been at least as sound and less artificial. The decision could have been better justified, she said, by relying on the line of Commerce Clause cases that established Congress's power to forbid the shipment in interstate commerce of objects that produced what Congress considered to be an evil in the destination state. (The cases in that line upheld, among other things, statutes forbidding the interstate shipment of lottery tickets, adulterated food, and goods manufactured in substandard labor conditions.) That approach, she said, would have focused the justification not on the fact that less food is consumed in establishments that discriminate but on something closer to the real concern: that interstate commerce was being used to facilitate racial discrimination. It was a sophisticated argument, and, I think, it was entirely right. I was not surprised when Julia made such a smart point; that was characteristic of her.

I reread Julia's exam in that class in order to prepare this letter. The exam was very solid, but I think it understated Julia's ability. She missed a couple of points that she could have made, and that meant that her grade was good rather than great. But the exam was the work of a very smart person. (I did not know at the time that it was Julia's exam; our exams are blind-graded.) I write notes about each of the exams while I am grading them, and one of the notes I wrote about Julia's exam was that, while it did not cover all the ground it should have covered, it was unusually intelligent: it was the work of someone who not only had an excellent understanding of the material but was able to go beyond the basics.

Julia is committed to advancing the rights of LGBTQ individuals and, as the saying has it, she walks the walk. In addition to her position in OutLaw, she spent time, as an undergraduate, as a crisis worker answering telephone calls on a suicide prevention hotline. I am sure she will carry that commitment into her career, and I am sure she will do outstanding work. I think she will be a great person to have in chambers. I recommend her very enthusiastically.

Sincerely,

David A. Strauss
Gerald Ratner Distinguished Service Professor of Law

Bridget Fahey
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June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It's a great pleasure to write this letter of recommendation for my student and research assistant Julia Crain. I first met Julia in my 1L Contracts class and was so impressed with her that I hired her as a research assistant even before the quarter concluded. Her work for me was terrific and as I have gotten to know her better, I have only become more impressed by her: she has rich and fascinating intellectual interests and a wonderful, warm personality. I recommend her for a clerkship without reservation. She will be an excellent law clerk and can look forward to a distinctive and distinguished career.

Julia served as a research assistant for me and did terrific work. I'm at the beginning stages of a project on originalism, and I asked Julia to canvass the literature on originalism's representation problem—that is, that relying on the views of the Founders excludes the views of women and people of color, subjecting today's diverse national community to the decisions made by a narrower and less representative group of individuals. Julia did a wonderful job. She not only found, read, and summarized the relevant literature in a matter of days, she synthesized the work into three main substantive themes, in each case connecting papers written by a range of authors across the span of decades—in some cases forging connections between articles that the authors themselves hadn't made. I was very impressed. And it was all very Julia—thorough and disciplined, but clearly motivated by her understanding of the consequences of the question she'd been asked. It bodes very well for her work as a law clerk, and for her life in the law.

I invite all of my first-year students to coffee in small groups throughout the quarter. These out-of-the-classroom moments allow me to get to know students in a more informal setting and give them a chance to interact with a professor without the intense pressure of our classroom environment. Last winter, when I had Julia in class, our law school still had COVID protocols that required masking in all law school spaces, so my coffees with Julia's class were less lighthearted than I would have hoped. Ordinarily, this might inhibit the goal of drawing students out of their shells and placing them at ease. But I remember my coffee with Julia and her group well. Julia stood out to me immediately, even behind a mask. She is soft-spoken, but everything she says in interesting and deliberate. I asked students about their hobbies and interests and was delighted to learn that Julia trained as an elite ballerina for 19 years. When I asked what she took from ballet into her academic career, she didn't hesitate: discipline. Having been an elite athlete, Julia is a person who knows how to work hard, to work through discomfort, to stay at it even when others drop off. My own experiences with Julia since that first coffee—professional and extracurricular—bear out that.

I have had the pleasure of seeing how deeply motivated Julia is by issues of justice and equality. That's obvious from her resume, which show the texture of her engagement with the world, even as a law student. In between college and law school—while working as an art cataloguer at Sotheby's—she founded Pique, a magazine focused on the artistic and cultural contributions of queer women. (Julia and I have had many conversations about ballet—a shared passion—and how new choreographers have pushed their art form beyond expected gender roles.) And she's continued as the magazine's editor even as she's thrown herself into life at the law school. Julia is president of the Law School's OutLaw group, which is known for its terrific programming for all law students. She's done sustained work as a crisis counselor—first during her time at Barnard, where she manned a crisis hotline and then after her graduation, as a volunteer with the Trevor Project, an organization that provides a crisis hotline for LGBTQ youth. And she spent her first summer as a law student doing capital habeas work in Alabama—among the hardest and most important work she could think of to do. Julia is, in short, a person with deeply felt passions and motivations, and a commitment to incorporating them into her life—whether she gets credit for them or not.

Julia earned a median grade in my Contracts course. I joined the faculty at the University of Chicago almost three years ago and one of the things I have been most impressed by in my first few years here is the extraordinary quality of our median student's exam. Because our grading scale has so many gradations, our students work incredibly hard, and earning a median grade requires immense time and effort because all of our students are hustling for every last point in their grade. It is, as a result, excruciating to assign grades in 1L classes. In my experience, what distinguishes a median exam from an exam that earned a grade even a standard deviation above is often a small creative maneuver or a particularly elegant point, not missed issues or inferior analysis. Our median student, in my experience, does not miss issues—and having reviewed Julia's exam, she is no exception. I am convinced that our 1Ls work the hardest of any in the country: In addition to subjecting them to three exam periods throughout the year because of our quarter system, we place them on a highly motivating curve. As a result, I can be confident that the median student in my Contracts class knows the subject in and out and worked hard for that knowledge. I have no doubts—at all—about Julia's ability to perform at the highest level as a law clerk.

As you can tell, I admire Julia very much, and I urge you to interview and hire her. I am sure you won't regret it. Please don't

hesitate to reach out to discuss Julia if I can be of any further assistance at all. She's a remarkable student and I'm excited to see where her legal career takes her.

Sincerely,
Bridget Fahey

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June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship recommendation for Julia Crain

Dear Judge Sanchez:

It is with great enthusiasm that I write to recommend Julia Crain for a clerkship in your chambers. Julia is extraordinary: very smart, sincere, hard-working, and committed to using her legal skills for good. I highly recommend her.

Julia's path to law school was a winding one. A lover of art, when she got to Barnard College as an undergraduate, Julia decided to major in art history. She did very well in the program, winning the Virginia B. Wright Prize for a promising future art historian. While at Barnard, however, Julia also got involved in advocacy on behalf of victims of sexual violence. She ultimately worked with university administrators to identify weaknesses in the university's Title IX policies and provided feedback to then-Governor Cuomo on proposed legislation to combat sexual violence. Julia found herself to be both very good at, and very interested in, the theoretical and practical challenges of legal reform and committed to the egalitarian ends they promoted. This explains why, despite obtaining a coveted job in the art world as a cataloguer at Sotheby's Auction House in New York, Julia decided after a few years to enter law school and put her prodigious academic and personal skills to the ends of public interest law.

The decision was a good one. Julia is a born lawyer. She is quick on her feet, excellent at identifying both the strengths and the weaknesses in legal arguments, and good at articulating herself succinctly and well. She is also thoughtful, sincere, and clearly driven by a strong commitment to equality and justice. I have had the pleasure of teaching Julia on in two of my classes this year at the University of Chicago Law School—First Amendment law (Constitutional Law II) and a seminar on Advanced Issues in First Amendment law—and Julia added a lot to the class discussion both times. Julia has a gentle demeanor, as well as a sharp mind; the combination makes her unusually able to productively engage with those who disagree with her. And she clearly loves First Amendment law (Of course, how could she not?). She was consequently an energetic, positive, but also incisive and at times provocative contributor to class discussion in both classes, but particularly in the more discussion-based seminar—someone I was really grateful to have in the room. These qualities lead me to think she would also be a terrific person to have in chambers.

Julia would bring other skills to the job as well. She is hardworking and an excellent multi-tasker. While at the law school, Julia has not only performed well in the classroom; she has also taken on a number of serious extracurricular responsibilities. In particular, she has proven herself to be one of the most energetic and effective presidents of OutLaw in the law school's recent history. In her capacity as president, she has brought a terrific roster of speakers to campus, to speak about how contemporary legal controversies impact the LGBTQ community, and pushed the student group to be a more active presence at the law school than it had previously been. She has also maintained her interest in contemporary art by continuing to publish the magazine, Pique, that she founded a few years ago to celebrate the art and culture of queer women. As these examples illustrate, Julia is productive, organized and very hard-working. Perhaps because of her background in, and continuing interest in, art Julia also brings to legal discussion a wide-ranging humanistic sensibility that can be illuminating. Julia was, for example, a very fun person to talk to about the First Amendment law of symbolic expression. More generally, she brings a range of perspectives and knowledge to doctrinal and normative debate.

Julia is also (if it wasn't already clear) a lovely person. She is forthright but gentle in her disposition, deeply sincere, and thoughtful. And she cares passionately about what she does. She is, in short, someone who is going to contribute a great deal to the world in the course of her legal career and someone who I have absolutely no doubt will make a terrific clerk. For all these reasons, I highly recommend Julia for a clerkship in your chambers. If I can do anything to aid you in your decision, or if you have any questions, please do not hesitate to email (glakier@uchicago.edu) or call (773 702-1223).

Sincerely,

Genevieve Lakier
Professor of Law and Herbert & Marjorie Fried Teaching Scholar

WRITING SAMPLE

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I drafted the enclosed brief for my LGBT Law course during my second year at The University of Chicago Law School. I was tasked with writing an amicus brief on the First Amendment issues found in a fictional fact pattern. The hypothetical case was filed in the Western District of Tennessee.

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STATEMENT OF ISSUES

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2. Students at Springfield harassed an openly gay student until he killed himself. Bullies continue to harass LGBT Springfield students. So Springfield sought to protect its vulnerable students. The question presented is whether Springfield violated the First Amendment by implementing a policy that prohibits bullying based on sexual orientation and gender identity.
3. Billie, a gender-nonconforming student, strives to resist sex stereotypes. He decided to express his femininity by wearing the ultimate symbol of teenage girlhood: a prom dress. But that was too daring for Springfield's taste. The question presented is whether Springfield violated his First Amendment right to express unconventional views.

STATEMENT OF FACTS

Homophobia haunts Springfield High School. It infests Springfield's halls. It torments its targets. And to grave consequence: after relentless anti-gay bullying, a sixteen-year-old Springfield student took his own life.

Not much has changed in the two years since the student's passing. But today, the school's bigots target Billie. Billie, a gender-nonconforming junior, was assigned male at birth and continues to use male pronouns. He expresses his nonconforming gender identity, with the support of his therapist and parents, by way of his dress. He dons feminine attire. He grows his hair long. He wears makeup. He carries a purse.

For Billie, Springfield High is a minefield. He is constantly dodging slurs; students regularly refer to him as a "faggot" and a "queer." His appearance is the frequent target of students' anti-LGBT vitriol.

Springfield Principal Diane Curtis knew she had to do something. So she instituted a new anti-bullying policy that "prohibit[s] bullying and discrimination based on race, ethnicity, religion, sex, sexual orientation, and gender identity."

But the bullying continued. It reached an apex in the leadup to Springfield's prom. After word got out that Billie planned to wear a dress to prom, Jacob, a student ringleader, began launching an attack. He rallied support among his lacrosse teammates. "It is ridiculous," he told them, that "a dude is going to wear a dress at prom." His plan? Mock Billie by clownishly wearing a dress to prom. He brought his buddies to the mall. He bought a garish wig. And he selected a racy dress.

To announce his plan, Jacob took a photo of the dress and posted it on Instagram. "Sexiest prom ever," he captioned the post, and tagged Billie. His bait was clear.

Back at school, students lamented how "the whole controversy [was] going to turn the prom into 'a joke' and ruin it for everyone."

Principal Curtis tried, again, to reign in the bullying. She punished Jacob for his post with a one-hour detention. If he kept the attacks on Billie going, she warned, he would neither attend prom nor play lacrosse for the rest of the season.

But in trying to settle the chaos, Principal Curtis went too far. She told Billie that he may, in no circumstance, wear a dress to prom. In so doing, she violated the First Amendment.

SUMMARY OF ARGUMENT

Competing interests drive the tension in primary and secondary school speech jurisprudence. On the one hand, as "nurseries of democracy," *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021), schools must empower young people to develop their own points of view. "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials…to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). Because school officials must "protect those entrusted to their care," *Morse v. Frederick*, 551 U.S. 393, 395 (2007), and because "no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech," *Mahanoy*, 141 S. Ct. at 2050, schools may impose regulations on student speech that go beyond ordinary First Amendment limits. *See e.g.*, *Barr v. Lafon*, 538 F.3d 554, 567–68 (6th Cir. 2008) ("First Amendment standards applicable to student speech in public schools…are unique, and courts accord more weight in the school setting to the educational authority of the school in attending to all students' psychological and developmental needs").

Springfield High School struggled to balance these interests. When it punished Jacob for mocking Billie, it correctly distinguished "bullying and harassment targeting particular individuals," *Mahanoy*, 141 S. Ct. at 2045, from "general statement[s] of discontent." *Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493, 506 (1st Cir. 2021). It assumed responsibility for providing a learning environment free from harassment. It recognized its duty to protect the young people entrusted to its care. But when it prohibited Billie from expressing his gender identity, it caved to the "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

ARGUMENT

I. The School Did Not Violate Jacob's Free Speech Rights.

A. Because of its responsibility to educate and protect students, Springfield has wide latitude to regulate its school environment.

"The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Fourth Amendment precedent illustrates the disparities. On the one hand, adults get strong protection from the Court's "reasonable expectation of privacy" test. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). They can expect to speak freely, without government eavesdropping, in enclosed public telephone booths. *Id*. They can expect to place their luggage into an overhead compartment, without the police squeezing it to determine its contents, on a Greyhound bus. *See Bond v. United States*, 529 U.S. 334, 338–39 (2000). On the other hand, students generally cannot expect privacy in schools. And so the Fourth Amendment affords them little protection. Schools may search students' purses when they smoke cigarettes on school grounds. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Schools may subject student athletes to drug tests without reasonable suspicion. *See Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

Students' rights are especially different from those of adults when it comes to free speech. For example, the "special characteristics of the school environment," *Tinker*, 393 U.S. at 506, require schools to ban speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id*. at 513. Outside of schools, the bar for banning speech is much higher. States may not even "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action

and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Furthermore, the Court welcomes disorder in the public sphere. *See, e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (the First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[S]o long as the means are peaceful, the communication need not meet standards of acceptability").

The same is not true in schools. They have more leeway to regulate speech when it comes to crude language. Because of "society's…interest in teaching students the boundaries of socially appropriate behavior," *Fraser*, 478 U.S. 675, 681, schools may ban "lewd, indecent, or offensive speech." *Id*. at 683. This narrowing of constitutional rights in schools makes sense. "As a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject." *Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring). In addition, "the school's authority and responsibility to act *in loco parentis* also includes the role of *protecting other students* from being maltreated by their classmates." *Chen Through Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 722 (9th Cir. 2022) (emphasis in original). Furthermore, "the preservation of order and a proper educational environment requires close supervision of children." *T.L.O.*, 469 U.S. at 339.

B. In punishing Jacob for his Instagram post, Springfield did not overstep its authority.

To assess the validity of a school's regulation of student speech, the court must first determine what kind of regulation is at hand. The Supreme Court has, thus far, addressed four

kinds of student speech regulations: (1) bans on lewd speech, *Fraser*, 478 U.S. at 683; (2) regulations of speech "bear[ing] the imprimatur of the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); (3) bans on "speech that can reasonably be regarded as encouraging illegal drug use," *Morse*, 551 U.S. 393, 397; and (4) regulations of "disruptive" speech. *Tinker*, 393 U.S. at 516 n.1. Jacob's post neither advocated for illegal drug use nor bore the imprimatur of the school. While the caption teased that this year's prom would be the "sexiest ever," he was not disciplined for the post's lewdness. Rather, Principal Curtis took issue with it because of its disruptive effects. As such, the *Tinker* standard applies.

The question is whether "the school authorities had reason to anticipate that" Jacob's post "would substantially interfere with the work of the school or impinge upon the rights of other students." *Id*. at 509. An "undifferentiated fear or apprehension of disturbance" would not have been a sufficient basis on which they could act. *Id*. at 508. But that was not the case here. Jacob's post targeted and demeaned another student. Because the school's history of rampant homophobia signaled a need to curb anti-LGBTQ bullying, Springfield was well within its constitutional limits when it instituted its anti-bullying policy.

Some speech, including that which targets and degrades a specific student, is per se disruptive to the school environment. *See, e.g.*, *Kutchinski v. Freeland Cmty. Sch. Dist. No 22-1748*, 2023 WL 3773665, at *4 (6th Cir. June 2, 2023) (explaining that "schools must be able to prohibit threatening and harassing speech") (internal citation omitted); *Chen Through Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 717 (9th Cir. 2022) (explaining that "students do not have a First Amendment right to 'target' specific classmates in an elementary or high school setting"); *Mahanoy*, 141 S. Ct. at 2045 (explaining that schools may regulate "serious or severe bullying or harassment targeting particular individuals"). For example, in *Doe v. Hopkinton Pub. Sch.*, eight

students on the school hockey team exchanged demeaning Snapchat messages about their teammate; they ridiculed his appearance, mocked his voice, and insulted his family. 19 F.4th 493, 497 (1st Cir. 2021). Vehement in its rejection of the students' First Amendment claim, the court emphasized, "speech that actively encourages such direct or face-to-face bullying conduct is not constitutionally protected." *Id*. at 508.

Courts have been reluctant to permit schools to sanction students when they express offensive views if they couch the views in broad terms. For example, in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, a school penalized a student for wearing a shirt that read "Be Happy, Not Gay," to express his moral opposition to homosexuality. 523 F.3d 668, 670 (7th Cir. 2008). But because he named no particular student, the court found that the school had overstepped. *See id.* at 676. After all, "There is a significant difference between expressing one's religiously-based disapproval of homosexuality and targeting LGBT students for harassment." *Id.* at 679. (Rovner, J., concurring). The Tenth Circuit reached the same conclusion vis-à-vis general, offensive student speech versus specific, targeted student speech. *See C1.G on behalf of C.G. v. Siegfried*, 38 F.4th 1270, 1279 (10th Cir. 2022). In that case, a school had punished a student for captioning a Snapchat photograph of himself and his friends in World War II-type garb, "Me and the boys bout [sic] to exterminate the Jews." *Id*. at 1274. The court found that the lack of "speech directed toward the school or its students" was dispositive, and the school had infringed on his free speech rights. *See id* at 1279.

Disruption to the school environment can manifest in a variety of ways. An "increase in absenteeism," *Barr*, 538 F.3d at 560, a bout of "upset, yelling, or crying" students, *Chen Through Chen*, 56 F.4th at 713, "a decline in students' test scores, [and] an upsurge in truancy," *Nuxoll*, 523 F.3d at 674, may indicate that disruption has, in fact, occurred.

Jacob's post disrupted the school environment. Rather than espousing general views on gender expression or gender identity, he singled Billie out. He identified Billie as the subject of his mockery by "tagging" him in the post. Even without the explicit identification, his target would have been obvious to his classmates; he shared a photograph of a dress with a snide caption about prom—after having publicly made fun of Billie for his decision to wear a dress to prom. Jacob's post was part and parcel of his larger scheme to bully Billie.

What about the fact that Jacob made his post after school hours and while he was off campus? No matter. "The school's regulatory interests remain significant in some off-campus circumstances." *Mahanoy*, 141 S. Ct. at 2045. For example, the Supreme Court in *Mahanoy* explicitly named off-campus "bullying" and "harassment" as within the school's jurisdiction to regulate. *Id*. That case was about a high school student who, during her free time and while she was off campus, posted critical messages about the school's cheerleading program on Snapchat. *Id*. at 2043. Unlike Jacob, the respondent in *Mahanoy* "did not identify the school in her posts or target any member of the school community with vulgar or abusive language." *Id*. at 2047.

The Court identified "three features of off-campus speech that often…distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech." *Id*. at 2046. First, the idea that schools stand in for parents to "protect, guide, and discipline" the students under their care, carries less force when the students are at home with their parents. *Id*. Second, "regulations of off-campus speech, when coupled with regulations of on-campus speech," impose a 24/7 ban on the given form of student speech. *Id*. Third, schools must strive to protect "unpopular ideas," as "public schools are the nurseries of democracy." *Id*. These factors pointed in favor of protecting the student speech in *Mahanoy*.

The Ninth Circuit assessed the *Mahanoy* factors in a recent off-campus student speech case and landed on the side of the school. *See Chen Through Chen*, 56 F.4th at 711. The student there created an Instagram account and "used the account to make a number of cruelly insulting posts" about specific classmates. *Id*. The posts were, according to the court, categorically different from speech that expresses an unpopular viewpoint. *Id*. at 722. "Students…remain free to express offensive and other unpopular viewpoints, but that does not include a license to disseminate severely harassing invective targeted at particular classmates in a manner that is readily and foreseeably transmissible to those students." *Id*. at 722-23. The latter is unworthy of protection, regardless of time of day. *Id*. at 721. Furthermore, the court acknowledged that schools retain a duty to protect students from bullying, even when it takes place off campus. *Id*. at 722. "Indeed, a *failure* by the school to respond to (the student's) harassment might have exposed it to potential liability." *Id*. (emphasis in original).

Likewise here, the school retained an interest in punishing Jacob for his speech, even though it took place off-campus. First, it was foreseeable that his harmful post would reach the school. The post itself indicates that Jacob wanted that to happen. By tagging Billie, Jacob ensured Billie would see it. In addition, other students were clearly his intended audience. Only they would know enough context—that Billie is gender nonconforming, and that he wished to wear a dress to prom—to catch the cruel joke. He wanted to instigate his classmates, and that is exactly what happened. Second, his targeted bullying was different in kind from the *Mahanoy* student's broad statement of dissatisfaction. Where the respondent in *Mahanoy* expressed frustration with a school program, Jacob taunted another student because of his identity. When the Court worried about school restrictions effectively controlling "all the speech a student utters during the full 24-hour day," *this* is not the kind of speech with which it was concerned. *Mahanoy*, 141 S. Ct. 2038, 2046.

Jacob's speech here was disruptive to the school, even though it took place off campus, and the school was within its authority to punish him.

C. Springfield's anti-bullying policy is not overbroad.

Jacob will likely argue that the policy is overbroad, as it may cover general expressions of anti-LGBT antipathy.

"A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Schickel v. Dilger*, 925 F.3d 858, 880 (6th Cir. 2019) (citation omitted). Courts are generally reluctant to strike down laws on overbreadth grounds. *See, e.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (noting that "invalidation for First Amendment overbreadth is 'strong medicine' that is not to be 'casually employed'") (citation omitted). That is especially true with regard to regulations of speech in primary and secondary schools. *See, e.g., McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 244 (3d Cir. 2010) (explaining that "the overbreadth doctrine warrants a more hesitant application in" primary and secondary schools "than in other contexts"). In addition, courts must strive to cure the overbreadth before striking a policy in its entirety. *See, e.g. Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) (noting that "a policy can be struck down only if no reasonable limiting construction is available that would render the policy constitutional"). Furthermore, "[I]t is important to recognize that the school district may permissibly regulate a broader range of speech than could be regulated for the general public, giving school regulations a larger plainly legitimate sweep." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011). Ultimately, the question is whether a school's policy "cover[s] substantially more speech than could be prohibited under *Tinker's* substantial disruption test." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

In primary and secondary schools, context may render otherwise permissible speech "disruptive." Take, for example, dress code bans on clothing with the Confederate flag. Sometimes, such bans are unconstitutional. *See e.g., Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (holding that the constitutionality of a Confederate flag ban depends, in part, on whether the school had a history of race-based violence). Other times, they are not. For example, in *Barr v. Lafon*, "racial tension" plagued the high school. 538 F.3d 554, 566 (6th Cir. 2008). Students marred its walls with racist graffiti. *Id*. at 567. "Hit lists" with Black students' names cropped up around campus. *Id*. Racially-motivated violence erupted in the halls. *Id*. at 557. There, unlike elsewhere, the school officials "reasonably forecast that permitting students to wear clothing depicting the Confederate flag would cause disruptions to the school environment." *Id*. at 566.

Disruption may justify policies more expansive than bans on specific symbols. The racial hostility at the school in *Sypniewski*, 307 F.3d 243, illustrates the point. There, a white student had shown up to school in Black face; he "wore a thick rope around his neck tied in a noose." *Id*. at 247. Several white students formed "gang-like" groups and celebrated "White Power Wednesdays." *Id*. They physically threatened other white students who associated with their Black peers. *Id*. The school responded by instituting the following policy:

> District employees and student(s) "shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. *Id*. at 249.

Except for the phrase "ill will," the policy, said the Third Circuit, was not overbroad. *Id*. at 265. "'Racial harassment or intimidation by name calling' is more likely disruptive in the Warren Hills schools than elsewhere." *Id*. at 264.

The pervasive homophobia at Springfield justifies the school's proscription of "bullying and discrimination based on…sex, sexual orientation, and gender identity." Anti-gay bullying drove a gay Springfield student to suicide just two years ago. Students today refer to Billie with homophobic slurs. They endlessly tease him for his appearance, as it does not conform with sex stereotypes. While in other contexts, general expressions of anti-gay antipathy may be protected speech, here, virulent anti-LGBT hostility "provides a substantial basis for legitimately fearing disruption." *Sypniewski*, 307 F.3d 243, 262. As such, the policy legitimately regulates "bullying and discrimination based on…sex, sexual orientation, and gender identity" because of such speech's disruptive effects. With regard to those characteristics, the policy is not overbroad.

The policy's language calls to mind Title VII's proscription of workplace discrimination against an employee "because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U. S. C. §2000e–2(a)(1). Title VII does not bar all harassment, only harassment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations omitted). Similarly, Title VI plaintiffs must show "'severe or pervasive' harassment" to establish a hostile environment claim. *L. L. v. Evesham Twp. Bd. of Educ.*, 710 F. App'x 545, 549 (3d Cir. 2017) (internal citations omitted). Title IX is no different. *See, e.g., Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (holding that a Title IX plaintiff "must show harassment that is so severe, pervasive, and objectively offensive,

and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities").

The same is true of Springfield's anti-bullying policy. It proscribes "bullying and discrimination based on race, ethnicity, [and] religion" when such bullying and discrimination rises to the level of creating a hostile environment. In drafting the policy, Springfield's administrators acted in recognition of a "longstanding interpretive principle: When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (internal citations omitted). Such a construction renders the policy fully compliant with the *Tinker* standard. Surely speech that creates a hostile school environment also substantially disrupts the school.

D. Springfield's anti-bullying policy does not amount to impermissible viewpoint discrimination.

Jacob may also argue that Springfield's policy is unconstitutional because it proscribes only *some* forms of bullying. In *R.A.V. v. City of St. Paul, Minn.*, the Supreme Court invalidated an ordinance that regulated the display of symbols "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. 377, 380 (1992). The statute, as construed by the Minnesota Supreme Court, applied to "fighting words," and thus "reached only expression 'that the First Amendment does not protect.'" *Id*. at 381. Nonetheless, the making of content-based distinctions within a low-value category posed a constitutional problem. *Id.* at 383-84. The Court explained:

> [Low-value] areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be

> made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government. *Id*.

A law may only make such content-based distinctions "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id*. at 388.

Springfield acted within *R.A.V*'s limits when it banned "bullying and discrimination based on race, ethnicity, religion, sex, sexual orientation, and gender identity." Bullying on the basis of "some immutable or at least tenacious characteristic," *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014), is the most invidious form of bullying. Such characteristics "bear [ ] no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). And minorities within each of the listed categories have historically "been subjected to discrimination." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). As such, discriminatory bullying is proscribable because the harm it inflicts is "the very reason the entire class of speech at issue is proscribable." *R.A.V*, 505 U.S. at 388.

In the alternative, the *R.A.V.* limit does not apply in the primary and secondary school context. Primary and secondary school speech precedent veers most sharply from general First Amendment rules when it comes to viewpoint discrimination. Whereas, "[i]n the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011), that is not so in schools. As the Sixth Circuit noted, "the Court in *Tinker* did not hold that a viewpoint-discriminatory rule in the schools would necessarily be unconstitutional; such a rule would still be constitutional if it met the disruption standard outlined in the opinion." *Barr*, 538 F.3d at 570.

II. The School Violated Billie's Free Speech Rights.

A. By denying him the opportunity to wear a dress to prom, the school silenced Billie's symbolic speech.

"The First Amendment literally forbids the abridgment only of 'speech,' but" the Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). A broad array of expressive conduct—from flag burning, *id.* at 399, to go-go dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991)—can implicate the First Amendment. Expressive conduct, in fact, lies at the heart of the Supreme Court's school speech jurisprudence; the students in *Tinker* expressed their opposition to the Vietnam War by wearing black armbands. 393 U.S. 503, 504.

Outside of the primary and secondary school context, the constitutionality of a regulation of expressive conduct depends on whether the regulation is "*directed at* the communicative nature of conduct," *Johnson*, 491 U.S. at 406 (emphasis in original), or is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The former triggers strict scrutiny. *See Johnson*, 491 U.S. at 412. The latter triggers intermediate scrutiny. *O'Brien*, 391 U.S. at 377. Specifically, courts ask "whether the legislature enacted [the] challenged law (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an 'incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.'" *84 Video/Newsstand, Inc. v. Sartini*, 455 F. App'x 541, 548 (6th Cir. 2011) (cleaned up).

In the primary and secondary school context, courts assess the constitutionality of regulations of expressive conduct with the same tests they use to assess restrictions of pure speech. *See, e.g., Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir. 2022). In the present case,

Principal Curtis restricted the wearing of prom dresses to cisgender girls for two plausible reasons: (1) she sought to silence Billie's expression of gender nonconformity, or (2) she sought to curb lewdness at Springfield. Neither justification, in the present circumstance, passes constitutional muster. Principal Curtis lacked a substantial basis for fearing disruption would ensue at the school as a result of Billie wearing a prom dress. *Tinker*, 393 U.S. at 513. It also would have been unreasonable for her to have regarded his wearing a dress as lewd. *See B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 298 (3d Cir. 2013).

The first step in the analysis is to determine whether the conduct being suppressed is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). Courts ask whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. By wearing a dress to prom, Billie would have met both prongs.

Dress code departures may be sufficiently expressive to implicate the First Amendment—but only if those departures are born from a desire to express more than individual style. The plaintiff in *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005), was unable to meet this threshold. Like many girls in the sixth grade, the plaintiff Amanda wanted "to be able to wear clothes that 'look [ ] nice on [her].'" *Id*. at 385-86. Her school's dress code stood in the way of her doing so. *Id*. But "the First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12–year old may wish to wear on a given day." *Id*. at 390. The student in *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152 (9th Cir. 2022), on the other hand, did sufficiently demonstrate an intent to convey a particularized message through her dress code departure. Her school did not permit students to decorate their graduation

caps and gowns. *Id*. at 1157. Yet the student, "an enrolled member of the Sisseton Wahpeton Oyate, a Native American tribe," wanted to adorn her cap with an eagle feather—an important symbol in her culture. *Id*. at 1155-56. The symbol takes on special significance in the school context, the court noted, due to the history of Native American school childrens' forced assimilation. *Id*. "[B]y wearing an eagle feather at graduation, [she] sought to convey a particular message of academic achievement and resilience." *Id*. at 1161.

A message must also be "readily underst[andable] by those viewing it." *Zalewska v. Cnty. of Sullivan, New York*, 316 F.3d 314, 320 (2d Cir. 2003). When a female bus driver for the Department of Transportation asked to wear a skirt (because of her views on modesty), in violation of the Department's pants-only policy, the Second Circuit wrote, "[I]t is difficult to see how Zalewska's broad message would be readily understood by those viewing her since no particularized communication can be divined simply from a woman wearing a skirt." *Id*. at 317-20. Similarly, when a high school teacher refused to wear a necktie, in violation of his school's faculty dress code, the court said his message of disaffection—as communicated through his lack of necktie—was too "vague and unfocused." *E. Hartford Ed. Ass'n v. Bd. of Ed. of Town of E. Hartford*, 562 F.2d 838, 857-58 (2d Cir. 1977). Nonetheless, clothing *may* effectively communicate information about its wearer. *See, e.g., Zalewska*, 316 F.3d 314, 319 (offering "the nun's habit" and "the judge's robes" as examples). The *Zalewska* court contrasted the female bus driver's inapparent message with an on-point example:

> [T]here may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection. A state court in Massachusetts, for example, found…that a male high school student's decision to wear traditionally female clothes to school as an expression of female gender identity was protected speech…This

> message was readily understood by others in his high school context, because it was such a break from the norm. It sent a clear and particular message about the plaintiff's gender identity. *Id*. at 320.

The legibility of the student's nonconforming gender expression was dispositive.

To express his nonconforming gender identity, Billie could have chosen no symbol more legible than a prom dress. Few garments capture an era's ideal of American femininity with such clarity. After all, prom occupies a singular place in the American teenage experience. Embedded into the popular imagination are prom scenes from classic coming-of-age movies: the iconic "hand jive" in *Grease*; the arrival of neck brace-clad Regina George in *Mean Girls*; the vicious prank in *Carrie*. And prom carries with it a slew of rigid, gendered customs. Boutonnieres for boys. Corsages for girls. Rented tuxedos for boys. Gowns for girls. By participating in the rite of prom, dressed in a gown, Billie's intent to celebrate his gender nonconformity would have been unmistakable.

Like the armbands in *Tinker*, Billie's dress expresses a political view. *See Tinker*, 393 U.S. 503, 516 n.1. The Sixth Circuit recently described nonconforming gender identity as a subject of "passionate political and social debate," *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021). Because "gender identity" is "a hotly contested matter of public concern," *Id*. at 506, Billie's expression is protected by the First Amendment.

B. The school violated the Constitution in silencing Billie's symbolic speech.

Springfield may not ban Billie's dress under *Tinker*. By wearing a dress, he would not have disrupted the school environment. When word got out about his plan, students did not protest. They did not turn away from their studies. They did not band together to cause a ruckus. Instead, they simply discussed the matter. To be sure, some were disappointed. They thought his wearing

of a dress was controversial. But that's not enough to silence him under *Tinker*. *See, e.g., Mahanoy*, 141 S. Ct. at 2047-48 (holding that the discussion of the respondent's speech in an Algebra class was insufficiently disruptive to warrant discipline). Jacob's response (creating his vicious Instagram post) was an outlier reaction. The record shows that only he exhibited an outsized reaction to Billie's plan. Jacob's choice to bully Billie is not, without more evidence of disruption, sufficient reason to silence Billie.

Nor may Springfield ban Billie's dress under *Fraser*. *Fraser* permits schools to regulate "lewd, indecent, or offensive speech," 478 U.S. 675, 683. But what about speech that may, to some, be distasteful, but that does not amount to lewd or indecent speech? The Third Circuit addressed the question in relation to a dispute over middle school students wearing breast cancer awareness bracelets that read, "I ♥ boobies! (KEEP A BREAST)." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 297–98 (3d Cir. 2013). The bracelets, the court said, fell outside of *Fraser*'s scope. *Id*. at 298. "[S]peech that does not rise to the level of plainly lewd and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted." *Id*. Likewise here, the speech at issue is not plainly lewd. By wearing a prom dress, Billie would be wearing an outfit no different than those of the girls at prom. There is no evidence that his dress would have been particularly revealing. Even so, there is no evidence that Springfield had implemented a policy requiring a level of modesty in dress. Therefore, any attempt to ban Billie's dress on grounds of modesty rings hollow. *C.f., Mahanoy*, 141 S. Ct. at 2047. ("[T]he school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom"). In addition, Billie's dress, like the breast cancer awareness bracelets, would serve as social commentary. Springfield may not invoke *Fraser* with impunity.

CONCLUSION

For the foregoing reasons, the court should dismiss Jacob's free speech claims and affirm Billie's right to express his nonconforming gender identity at the Springfield prom.

Applicant Details

First Name	**Michael**
Middle Initial	**F**
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Contact Phone Number	**2039402059**

Applicant Education

BA/BS From	**University of Richmond**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 5, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Technology Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Oral Advocacy Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a May 2023 graduate of the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term.

Prior to law school I worked in Washington D.C. for two years first interning for a member of Congress, and then working at a political research firm. That experience helped me sharpen my research and writing skills and develop a strong attention to detail and ability to adhere to tight deadlines. I carried those skills over to law school where I earned honors in my legal writing course, volunteered for a year at the Michigan Innocence Clinic and the Civil Criminal Litigation Clinic, and served as a Senior Judge – a legal research and writing assistant for the legal practice professor. I also oversaw the selection and editing of scholarly articles as the Managing Articles Editor for the Michigan Technology Law Review. Last summer I worked at Cleary Gottlieb Steen & Hamilton as a summer associate in their New York office where I will return in the fall. My experience in law school, and especially with the Michigan Innocence Clinic and the Civil Criminal Litigation Clinic, where I had had the opportunity to prepare briefs, file motions to appeal, argue in court and serve as counsel in a bench trial has convinced me that clerking would provide me with invaluable training for my future career as a litigator and allow me to engage in public service, which I intend to make an essential part of my future career.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

- Professor Barbara McQuade: bmcquade@umich.edu
- Professor David Moran: morand@umich.edu
- Professor David Santacroce: dasanta@umich.edu

Thank you for your time and consideration.

Respectfully,

Michael Cronin

Michael Cronin

405 S. Main St., Apt 211, Ann Arbor, MI 48104
203-940-2059 • mfcronin@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL (3.693 GPA: Historically top 25%) Ann Arbor, MI

Juris Doctor May 2023
Honors: Dean's Scholarship
Activities: *Managing Articles Editor - Michigan Technology Law Review* Fall/Winter 2021-2023
Treasurer – Criminal Law Society
Volunteer at Civil Rights Litigation Clearinghouse, Oral Advocacy Competition

UNIVERSITY OF RICHMOND Richmond, VA
Bachelor of Arts in Politics, Philosophy, Economics and Law May 2018
Minor: Journalism
Activities: Intern at Richmond General Assembly
Sports Editor of *The Collegian* – University of Richmond Student Newspaper, Volunteer at Huntsman Cancer Foundation

EXPERIENCE

CIVIL CRIMINAL LITIGATION CLINIC (UNIVERSITY OF MICHIGAN LAW SCHOOL) Ann Arbor, MI
Student Attorney January 2023 – May 2023

- Represented clients in eviction proceedings before Michigan circuit court in Washtenaw County
- First chaired a bench trial in a suit for nonpayment of rent, secured dismissal in the case

CLEARY GOTTLIEB STEEN & HAMILTON (OFFER EXTENDED PLAN TO RETURN) New York, NY
Summer Associate May 2022– July 2022

- Performed research and wrote memoranda in support of litigation and enforcement matters
- Supported attorneys and attended meetings between Cleary attorneys and government attorneys and clients

MICHIGAN INNOCENCE CLINIC (UNIVERSITY OF MICHIGAN LAW SCHOOL) Detroit, MI
Student Attorney August 2021– May 2022

- Conducted research and investigated innocence claims from people convicted of felonies in Michigan
- Prepared briefs, memoranda and motions in support of litigation for Innocence Clinic clients and investigation subjects

UNIVERSITY OF MICHIGAN LAW SCHOOL - LEGAL WRITING AND RESEARCH SEMINAR Ann Arbor, MI
Senior Judge August 2021– May 2022

- Helped prepare entering 1L students at Michigan Law for their writing and research assignments and supported their transition into law school
- Graded and gave feedback on student assignments including memos, citation assignments and oral arguments

UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF MICHIGAN Detroit, MI
Law Student Volunteer June 2021 – July 2021

- Drafted memos and conducted research on legal policy for AUSAs in support of criminal and civil cases

- Attended and monitored court proceedings and shadowed AUSAs in day-to-day activities

LAKE RESEARCH PARTNERS Washington, D.C.
Research Fellow August 2019 – May 2020

- Conducted political research & analysis of candidates for office, including the Biden presidential campaign
- Crafted presentations, compiled and interpreted research data, & recorded team and client meetings
- Organized and facilitated surveys and focus groups with field director

SKILLS & INTERESTS

Interests: Basketball, tennis, golf, reading, chess, podcasts, e-books, running, bike rides, fantasy football

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	530	003	Criminal Law	Barbara Mcquade	4.00	4.00	4.00	A
LAW	540	001	Introduction to Constitutional Law	Samuel Bagenstos	4.00	4.00	4.00	B+
LAW	580	002	Torts	Don Herzog	4.00	4.00	4.00	B+
LAW	593	015	Legal Practice Skills I	Mark Osbeck he-him-his	2.00		2.00	H
LAW	598	015	Legal Pract:Writing & Analysis	Mark Osbeck he-him-his	1.00		1.00	H
Term Total				**GPA: 3.533**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.533**		**12.00**	**15.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	510	001	Civil Procedure	Daniel Hurley	4.00	4.00	4.00	A
LAW	520	001	Contracts	Daniel Crane	4.00	4.00	4.00	A-
LAW	594	015	Legal Practice Skills II	Mark Osbeck he-him-his	2.00		2.00	H
LAW	751	001	Accounting for Lawyers	James Desimpelare	3.00	3.00	3.00	A
Term Total				**GPA: 3.890**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.704**		**23.00**	**28.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	601	001	Administrative Law	Nina Mendelson	4.00	4.00	4.00	B+
LAW	741	004	Interdisc Prob Solv Identity Theft: Causes and Countermeasures	Barbara Mcquade Bridgette Carr Florian Schaub	3.00	3.00	3.00	A
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	976	001	Michigan Innocence Clinic	David Moran Imran Syed Megan Richardson	4.00	4.00	4.00	A-
LAW	977	001	Michigan Innocence Clinic Sem	David Moran Imran Syed Megan Richardson	3.00	3.00	3.00	A-
Term Total				**GPA: 3.650**	**16.00**	**14.00**	**16.00**	
Cumulative Total				**GPA: 3.683**		**37.00**	**44.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	643	001	Crim Procedure: Bail to Post Conviction Review	Barbara Mcquade	3.00	3.00	3.00	A-
LAW	731	001	Legal Ethics and Professional Responsibility	Bob Hirshon	2.00	2.00	2.00	A-
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	976	001	Michigan Innocence Clinic	David Moran Imran Syed Megan Richardson	4.00	4.00	4.00	A-
LAW	977	001	Michigan Innocence Clinic Sem	David Moran Imran Syed Megan Richardson	3.00	3.00	3.00	A-
Term Total				**GPA: 3.700**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.687**		**49.00**	**58.00**	
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	429	001	Federal Prosecution & Defense	Leonid Feller	2.00	2.00	2.00	B+
LAW	669	002	Evidence	David Moran	3.00	3.00	3.00	B+
LAW	793	001	Voting Rights / Election Law	Ellen Katz	4.00	4.00	4.00	A-
LAW	980	366	Advanced Clinical Law	Imran Syed	3.00	3.00	3.00	A
Term Total				**GPA: 3.608**	**12.00**	**12.00**	**12.00**	
Cumulative Total				**GPA: 3.672**		**61.00**	**70.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cronin III,Michael Fitzgerald
Student#: 14859373

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	428	001	Evidence Practicum	Daniel Hurley	2.00	2.00	2.00	A-
LAW	786	801	History of International Law	Alonso Gurmendi Dunkelberg	2.00	2.00	2.00	A-
LAW	809	001	Cross-Border Mergers & Acquis	Alicia Davis	2.00	2.00	2.00	A-
LAW	920	001	Civil-Criminal Litigation Clnc	David Santacroce Victoria Clark	4.00	4.00	4.00	A
LAW	921	001	Civil-Criminal Litig Clnc Sem	David Santacroce Victoria Clark	3.00	3.00	3.00	A-
Term Total				**GPA: 3.792**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.693**		**74.00**	**83.00**	

End of Transcript
Total Number of Pages 4

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

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University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Michael Cronin for a position as a judicial clerk in your chambers. I have come to know Mike very well as he was one of 24 student attorneys for 2021-22 in the yearlong Michigan Innocence Clinic, which I direct and teach, at the University of Michigan Law School. Because he did very well, he was invited back to be a student-attorney again (as an "Advanced Clinical Law" student) for the Fall 2022 term.

Mike's overall academic performance was solid throughout law school as he graduated with a 3.69 grade point average. He was also an editor of one of the journals here at Michigan, he helped teach legal writing to first-year students, and he was active in several student organizations.

As I mentioned above, I got to know Mike primarily through his work in the Michigan Innocence Clinic. While all of his work was very good, I will mention a few examples. First, he spent a great deal of time preparing to deliver an oral argument to a trial judge on a motion for DNA testing. The argument was very contentious, but Mike held his ground against the prosecutor (and the very skeptical judge) very well. In another case that we were about to give up on, Mike managed to convince several witnesses to speak to him, thus breathing new life into the case.

Mike's work on the many other cases we assigned him was equally strong. In the course of working on these cases, he demonstrated that he is able to quickly grasp complex legal issues of all sorts. In addition, Mike drafted many memos for me. I found his writing to be clear and his analytical skills to be excellent.

Having spent many hours working with Mike on various cases, I considered him to be more of a colleague than a student. I should add that he is a very friendly person without a trace or arrogance or pretension.

In short, I believe Mike will make an outstanding law clerk for any judge fortunate enough to hire him. Please feel free to contact me if you would like to discuss his qualifications further, as I would be happy to do so.

Sincerely,

David A. Moran

David Moran - morand@umich.edu - 734-615-5419

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

Barbara L. McQuade
Professor from Practice

June 13, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Michael Cronin for a clerkship in your chambers. A recent graduate of Michigan Law School, Mike has been one of my best students, and I am enthusiastic in my recommendation. Mike is interested in clerking because he has great appreciation for the important role of our courts, and he wants to provide valuable public service. He also hopes to hone his already strong research, writing, and advocacy skills and to gain a deeper understanding of substantive and procedural law as he prepares for a career that he hopes will eventually lead to public service as an assistant U.S. attorney.

I first got to know Mike when he was as a student in my first year Criminal Law class. In that class of approximately 80 students, Mike stood out as someone who was always prepared to participate in discussions about legal doctrine and policy in an insightful way. I later had the pleasure of having Mike in my Advanced Criminal Procedure course and a small class on identity theft. In that smaller environment, I was able to closely observe Mike's impressive problem-solving and research skills, traits that will serve him well in a clerkship. I was also able to appreciate Mike's excellent inter-personal skills. He is a supportive classmate who was fully engaged in our class discussions. During law school, Mike also worked in two of law school's clinics, gaining important insights for someone who aspires to someday be a federal prosecutor. In addition, Mike served as the managing articles editor for a law school journal, where he further developed his writing skills, already strong from his undergraduate studies in journalism and work on his college newspaper. Mike also served as a senior judge in our legal practice program, a highly selective position for students with excellent writing skills who help teach first-year legal writing.

Mike brings with him a maturity from lived experience, having worked before coming to law school. Mike served first as a congressional intern and later as a research fellow, roles that required him to conduct research, solve problems, and work with people. These experiences have no doubt contributed Mike's strong analytical skills and good judgment. In the fall, Mike plans to join the New York office of Cleary Gottlieb, having worked there last summer. During his first law school summer, Mike worked at the U.S. Attorney's Office for the Eastern District of Michigan, where I spent 20 years of my career. These practice opportunities have helped Mike develop skills that will be useful as a law clerk.

I previously served as U.S. Attorney for the Eastern District of Michigan. In that role, I had the opportunity to hire more than 60 lawyers, and Mike has the kinds of qualities that I would look for in a new hire – a strong intellect, an ability to work with others respectfully, and effective communication skills. Mike possesses all of these qualities in abundance, which will make him a valuable resource as a law clerk.

I know from my own experience as a law clerk that a judge's chambers can be like a family, so it is important to bring in clerks who will add value, respect confidences, and perform every task with enthusiasm and excellence. I think Mike is very well suited to succeed in this environment. He will be an able assistant to any judge who hires him as a clerk. He has the intellectual capacity to tackle and solve challenging legal problems, he can express his ideas effectively in writing, and he will be a delightful colleague.

For all of these reasons, I enthusiastically recommend Michael Cronin for a clerkship in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Barbara L. McQuade
734.763-3813
bmcquade@umich.edu

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Michael Cronin

Dear Judge Sanchez:

I enthusiastically write to recommend Michael Cronin for a clerkship with the Court. Michael is one of the most naturally talented, responsible and diligent students I have ever taught. He will make an excellent clerk.

Michael was my student in the in the Civil-Criminal Litigation Clinic here at the University of Michigan Law School in the Winter of 2023. During that time, Michael practiced law under my supervision as a "first chair" attorney. He worked on a variety of cases, some simple, some complex. Enrollment in the Clinic also involved 4 hours of class each week thus giving me a great opportunity to observe him at work in a variety of contexts. In both class and practice, Michael was spectacular.

Michael came to the clinic with political research and writing experience gained during his gap year and a year-long stint as a second year law student in our Innocence Clinic. It immediately showed. Near the end of the first week of class he was given a case set for trial in just two weeks. I don't believe he had ever appeared in court and know that he had never done trial level litigation. In that short time, under my supervision, he prepared all the necessary trial elements: open, close, crosses, directs, and a large stack of exhibits. His work was extremely impressive. His research was exemplary. His writing sharp, crisp, to the point and far ahead of his peers. And his insight into what mattered and what didn't rivaled attorneys who have been practicing for years. Finally, at trial, he worked impressively and at an extremely advanced level. He spoke eloquently, asked all the right questions, and never flustered in the face of a handful of unexpected twists and turns. Perhaps most importantly, he reflected on his work and took serious the lessons that his successes and mistakes brought. In my eyes, these abilities put him ahead of most of his peers.

Michael stands apart in other ways. He is mature beyond his years and driven to succeed without the aggressiveness we often see in young lawyers. He is also extremely well balanced and spoken. He worked with his classmates and clinic staff in timely, empathetic and collaborative way. All of these traits made him a true pleasure to work with, an opinion shared by his fellow students and clinic staff alike. I firmly believe that, if given the chance, he will make an excellent clerk.

If you need more or different information, please feel free to call or e-mail me.

Sincerely yours,

David A. Santacroce, Esq.
Clinical Professor of Law
Director, Civil/Criminal Litigation Clinic
University of Michigan Law School
dasanta@umich.edu

Michael Cronin
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Writing Sample

I prepared this leave to appeal for the Michigan Court of Appeals after we filed a motion to have DNA testing performed on evidence for a client, which the judge denied. I have permission to use this as a writing sample. This draft is self-edited. I have removed portions that are not my work.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Trial Court No. A-96-000245-FC

Court of Appeals No.: _____

v

MARK ALLEN PORTERr,

Defendant-Appellant.

DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

University of Michigan Law School

Michigan Innocence Clinic

David A. Moran (P45353)

Imran J. Syed (P75415)

Megan B. Richardson (P85230)

Michael Cronin (Student Attorney)

Attorneys for Defendant

701 S. State Street

Ann Arbor, MI 48109

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this Application for Leave to Appeal pursuant to MCL 770.16(10). *See also* MCR 7.203(B)(4). This Application is filed less than 21 days after the trial court's judgment on March 23, 2022 and is thus timely under MCR 7.205(A)(1)(a).

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Mark Porter seeks leave to appeal from the March 23, 2022, Order of the St. Clair County Circuit Court denying his motion for inspection and testing of physical evidence under MCL 770.16. Trial Court Order, Appendix A.

As discussed in greater detail below, Mr. Porter satisfies the statutory requirements under MCL 770.16 and has a due process right to the inspection and retesting of DNA evidence that might prove

his innocence. Therefore, the court below abused its discretion in denying Mr. Porter's motion and Mr. Porter respectfully asks this court to:

(1) Grant this application for Leave to Appeal;

(2) Vacate the trial court order denying his motion for inspection and retesting of physical evidence and remand the case for rehearing under the proper standard; or

(3) Summarily reverse the trial court's order and grant his underlying motion.

STATEMENT OFf QUESTIONS INVOLVED

1. **Did The Trial Court Err In Denying Mr. Porter's Motion Under MCL 770.16 For Inspection And Testing Physical Evidence Where Mr. Porter Satisfies All The Requirements Of MCL 770.16 With Respect To The Duct Tape Recovered From The Crime Scene?**

   The Defendant-Appellant Answers, "Yes."

   The Trial Court Answered, "No."

2. **Did The Trial Court Err Where—Upon finding That MCL 770.16 Does Not Entitle Mr. Porter To Having the Duct Tape Inspected And Tested—The Court Found That Mr. Porter Does Not Have A Fourteenth Amendment Due Process Right Under *District Attorney's Office v Osborne* To Such Inspection And Testing, Given That The Duct Tape Could Prove His Innocence?**

   The Defendant-Appellant Answers, "Yes."

   The Trial Court Answered, "No."

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Statement of Facts

On September 28, 1995, George and Dorothy Wendel were found dead in their home by their housekeeper. TT 2/12/1997 at 333. The Wendels were found in different rooms, both bound with duct tape. TT 2/12/1997 at 479–80. Dorothy Wendel was severely beaten and bled heavily during the attack, though the cause of her death was found to be asphyxiation. TT 2/12/1997 at 723. George Wendel was found bound as well, though he was otherwise physically unharmed. His cause of death was also asphyxiation. TT 2/12/1997 at 720.

Despite the violent nature of the crime and the apparent struggle, no physical evidence collected at the scene was matched to anyone other than the Wendels. TT 2/12/1997 at 951.

Mark Porter was convicted of two counts of felony-murder by a jury before Judge Adair in February 1997. With no forensic evidence connecting Mr. Porter to the crime, the prosecution built its case on the testimony of Mr. Porter's sister (who tipped off the police that her brother might be involved), as well as the fact that Mr. Porter was arrested with two rings belonging to the Wendels. Court of Appeals Opinion, 3/16/99, at 2 (attached as Appendix C).

Photographs from the crime scene show the duct tape used to bind Dorothy Wendel is saturated with blood. Crime Scene Photographs (Appendix F). The police also recovered at least one human hair from the surface of the duct tape that was not consistent with the known head hair from either George or Dorothy Wendel. Marysville Police Depart Report, 73 (Appendix G). The Marysville Police unsuccessfully attempted to recover fingerprints from the duct tape used to bind the Wendels, (Property Tag Nos. L-19, L-20, L-21, L-22, L-23), but they were unable to lift any usable prints. TT 2/20/1997 at 1049. No DNA analysis was conducted on the duct tape, nor was the tape retested for fingerprints in 2020 (when usable prints collected in 1995 were entered into CODIS). Department of State Police

Laboratory Report (Appendix D). Given the tape's sticky nature, the duct tape samples are good candidates for modern touch-DNA testing. Affidavit of Dr. Greg Hampikian, ¶ 39 (Appendix B).

Procedural Background

In 1999, Mr. Porter appealed his convictions as of right to this Court, which affirmed his convictions. Court of Appeals Opinion (Appendix C). In 2002, Mr. Porter filed an unsuccessful motion for relief from judgment, on grounds unrelated to DNA testing.

In January 2022, the Michigan Innocence Clinic confirmed that the Marysville Police Department has the duct tape samples in its possession. Marysville Police Department FOIA Response (Appendix E). At the request of the Clinic, DNA expert Dr. Greg Hampikian, a Professor of Biology and Criminal Justice at Boise State University and the Director of the Idaho Innocence Project, provided an evaluation of the duct tape as testable evidence. He found that there is a significant chance that DNA may be recoverable from the duct tape. Affidavit of Dr. Greg Hampikian, ¶s 39-41 (Appendix A).

In February 2022, the Michigan Innocence Clinic filed a motion pursuant to MCL 770.16 for the inspection and testing of the duct tape for touch DNA. The Michigan Innocence Clinic argued this motion in front of Judge West in the St. Clair County Circuit Court in March 2022.

Judge West denied the motion, finding that Mr. Porter did not meet the statutory requirements of MCL 770.16. Specifically, Judge West found that the blood on the duct tape does not constitute "biological material" under MCL 770.16(1) and (4)(b)(ii). Judge West, after admitting that he "[does not] have a great deal of experience with the statute," said that his understanding of MCL 770.16 was that the defendant has to "establish prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity." MT 3/21/22 at 13. Judge West further clarified that "the evidence that is now sought to be . . . tested has to be biological evidence that would lead to the resolution

of the question of the identity of the perpetrator." *Id.* Judge West found Mr. Porter's argument based on touch DNA to be "purely speculative." MT 3/21/22 at 16. In doing so Judge West refused to acknowledge the crime scene photograph we offered in which the duct tape in question is plainly saturated with blood, which surely constitutes biological material. Crime Scene Photographs (Appendix F). Judge West was also unpersuaded by the fact that the Marysville Police Department clearly identified biological material on the duct tape in the form of one human hair. Marysville Police Depart Report, 73 (Appendix G).

Judge West also denied Mr. Porter's due process claim to the evidence under *District Attorney's Office v Osborne*, noting only that he found the due process argument "to be unpersuasive under the circumstances of the case" MT 3/21/22 at 21.

Argument

Introduction and Summary of Argument

The Michigan Legislature, the Michigan Supreme Court, and this Court have all recognized the need for a robust legal scheme for access to potentially exonerating evidence. The State Legislature enacted MCL 770.16 in 2001 with the aim of providing individuals that are incarcerated for a felony conviction with a means to access the evidence collected during the investigation leading to the conviction, in order to conduct DNA testing on that evidence using the more sensitive technology that has become available since the time of the investigation that led to the conviction. MI. F.H.A. B. An., S.B. 1395.

MCL 770.16 lays out four elements that must be met to gain access to evidence that may contain biological material. Mr. Porter's request met all four of those elements: (1) There was biological material collected and identified during the original investigation; (2) The evidence presented for testing is material to the identity of the perpetrator; (3) The duct tape in question – the material evidence – is

available for testing and was not subject to DNA testing initially; and (4) Mr. Porter's identity as the perpetrator was an issue at trial. Therefore, the trial court erred in denying Mark Porter's motion.

A reasonable reading of MCL 770.16 further allows petitioners to have the material evidence – the duct tape – examined to determine whether biological material exists, before asking for DNA testing or a new trial based on the results.

MCL 770.16 was created to allow for old evidence to be tested–or retested–using new technology. In many cases, forensic examiners would not have looked for entire catagories of biological material because the technology did not exist to identify such material. In 1995, when Mr. Porter was arrested, touch DNA technology was years away from being widely available to the police. We have identified possible biological material in the form of touch DNA that may be on the duct as a result of the perpetrator handling the tape while subduing the victims. Therefore, even if the trial court found that Mr. Porter did not meet all four requirements of MCL 770.16, the trial court still erred in refusing to grant Mr. Porter's motion.

Finally, if MCL 770.16 cannot be read to grant petitioner access to material evidence in order to test for the presence of biological material that could not have been identified during the initial investigation, then the trial court, in denying Mr. Porter's motion, violated Mr. Porter's Fourteenth Amendment Due Process right to reasonable access to evidence that could prove his innocence, as established by *District Attorney's Office v Osborne*.

Standard of Review

This Court should review the Circuit Court's decision de novo as this case presents issues of statutory interpretation, which are questions of law. *Lesner v. Liquid Disposal, Inx.,* 455 Mich 95, 99-

100; 643 NW2d 533, 555 (2002); *See also Levy v Martin*, 463 Mich. 478, 482, n. 12, 620 N.W.2d 292 (2001); *Donajkowski v Alpena Power Co*., 460 Mich. 243, 248, 596 N.W.2d 574 (1999).

I. Judge West Erred First In Concluding That Mr. Porter Did Not Meet His Burden Of Alleging That DNA Was Collected During The Investigation

Judge West's first erred in concluding that Mr. Porter did not satisfy the requirement of the MCL 770.16(3), that the defendant must allege that "biological material was collected during the investigation of the defendant's case." *Id.* He did so despite Mr. Porter's attorneys' repeated attempts to show him crime scene photographs in which the duct tape in question is clearly visible and saturated with blood. Crime Scene Photographs (Appendix G). Judge West refused to look at the picture stating that he was not an expert and could not "tell if something with a photograph has biological material on it." Hearing Transcript 5:25-6:1 (Appendix H). He stated, "I don't know how you can unless you have qualifications to make that determination." *Id.* at 5:25-6:2. In doing so, Judge West erroneously added an additional prong to MCL 770.16(3) by requiring that an expert make the initial determination that biological material was collected.

There is no such requirement in the language of the statute nor is there any reason to read one in. The term biological material means, among other things, "human products, including blood, tissues, bodily fluids, clinical specimens." https://safety.ucanr.edu/Plans,_Forms_and_Templates/Biosecurity_Survey/Biological_materials_definition/. Since blood is included in this definition and since blood is visible on the tape in the photograph provided to the court there is no need for an expert to confirm that this qualifies as biological material.

II. Judge West Next Erred In His Interpretation Of The Plain Language of MCL 770.16(4)(a)

Judge West also erred in, after assuming *arguendo* that the blood does in fact constitute biological material satisfying MCL 770.16(3), finding that Mr. Porter had not satisfied his burden under MCL 770.16(4)(a). That section states that the court shall order DNA testing if the defendant "presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of the crime." *Id.*

Judge West concluded that since the blood on the duct tape might have come from the victim rather than the perpetrator, Mr. Porter could not satisfy the materiality prong of this section of the statute. Hearing Transcript 12:19-24 (Appendix G). In doing so Judge West conflates the words *biological material* used in MCL 770.16(3), with the word *evidence* used in MCL 770.16(4).

The Michigan Supreme Court has stated that the goal of statutory interpretation is to give effect to the intent of the legislature from the plain language of the statute. *People v. Williams*, 475 Mich. 245, 250, 716 N.W.2d 208 (2006).

MCL 770.16(3) requires Mr. Porter to show that biological material was collected during the investigation, which he did when he offered the court the photograph of the duct tape saturated with blood and the police report identifying the human hair recovered from the surface of the duct tape. Once Mr. Porter has reached this threshold showing that there was biological material collected from that evidence, MCL 770.16(4)(a) only requires that he show that evidence (the tape), not the biological material itself (the blood), is material to the identity of the perpetrator. The tape is material to the identity of the perpetrator because it is undisputed that the perpetrator of this crime bound the Wendels using this tape and thus, if the touch-DNA of someone other than Mr. Porter or the victims were found on that tape, it would logically follow that this other person was the true perpetrator.

Judge West's interpretation, on the other hand, would require the defendant to show that the biological material identified in 770.16(3) is itself material to the perpetrators identity as required by

770.16(4)(a). This interpretation runs contrary to the plain language of the statute, which distinguishes between the biological material referred to in 770.16(3) and the evidence referred to in 770.16(4)(a).

The term "biological material" is written 22 times throughout the statute and the word "evidence" is used 4 times. However, Judge West's interpretation assumes that the legislature intended no difference in meaning between "biological material" and "evidence." This contradicts the canon of consistent usage, a fundamental precept of statutory construction, which requires courts to construe statutes so that when the legislature uses different words at various points in a statute those "different words have different meanings." *Honigman Miller Schwartz & Cohn LLP. City of Detroit*, 505 Mich. 284, 323, 952 N.W.2d 358, 378 (2020); *See also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, (St. Paul: Thomson/West, 2012), § 25; 2A Sutherland, *Statutes and Statutory Construction*, § 46:6, p. 261 ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible.").

A more faithful reading of the statute would require the defendant to show that, under MCL 770.16(3), *biological material* was found on the evidence sought to be tested. And once the defendant has made that showing, they can, under MCL 770.16(4)(a), then test the entirety of the *evidence*, where the biological material was found, so long as the *evidence* itself is material to the identity of the perpetrator. Mr. Porter satisfies 770.16(3) by showing that blood, clearly biological material, was found on the tape. He can therefore test the tape, not merely the blood itself, since the tape is the evidence material to the identity of the perpetrator under 770.16(4).

a. The legislature intended to allow testing of material evidence and not just the biological material on the evidence

A reading of MCL 770.16 that allows for the testing of material evidence would also be more faithful to the Michigan case law that exists on this topic. *People v. Poole,* 311 Mich.App. 296 (2015), and *People v. Barrera,* 278 Mich.App. 730 (2008), have both clarified the legislature's intent in drafting MCL 770.16. In *Barrera*, the court considered the materiality prong of MCL 770.16. The petitioner in that case requested the testing of not only the biological material, but also of the evidence containing the biological material. In order to meet the requirements of MCL 770.16, the court said that the "defendant must show that all *the items containing DNA matter* he seeks to be tested are material to establishing the identity of the perpetrator of the rape. To do so, defendant must link *the DNA-stained evidence* to both the crime and the criminal." *Barrera,* 278 Mich.App. 730, 738 (emphasis added). In determining whether the DNA-stained evidence is material to the identity of the perpetrator of the crime, "there must be some logical relationship between the evidence sought to be tested and the issue of identity." *Id* at. 737.

The requirement of MCL 770.16(3) that there be biological material collected and identified during the original investigation is only the first step in the inquiry under MCL 770.16. Once it has been established that there is biological material, the inquiry switches to consideration of the materiality of "*the evidence*" sought to be tested under MCL 770.16(4)(a). In enacting MCL 770.16, it is apparent that the legislature wanted to avoid overburdening the courts with fishing expeditions in which defendants seek to test only tenuously related physical evidence on the off chance there is relevant material. In a case where the defendant can establish that there is evidence which contains biological material, that the perpetrator necessarily handled evidence during the commission of the crime in question, in circumstances where there was no biological or forensic evidence linking the defendant to the crime presented at trial, that concern is unfounded.

In this case, Mr. Porter can prove that the evidence he seeks to have tested is material to the identity of the perpetrator of the crime he was convicted for. There is currently biological material on

the evidence – the duct tape. MCL 770.16 read as intended allows Mr. Porter to access this duct tape to determine whether there is sufficient biological material on it that can be used to create a DNA profile. In 1995, the idea that the tape could be analyzed for touch DNA was never considered, so we have no way of knowing whether such evidence is available. However, the other biological material is similarly relevant to the identity of the perpetrator, and more importantly, shows that the tape – the evidence containing the biological material – is material to the defendant's identity as the perpetrator of this crime.

III. In the Alternative, Mr. Porter Also Has A Due Process Right To Reasonable Access To The Evidence.

Judge West also erred in his analysis of the Fourteenth Amendment Due Process Clause right of petitioners to access evidence that may prove their innocence, given that the state provides a framework for DNA testing of evidence, a right Michigan established in MCR 6.501, *et seq*., and MCL 770.16.

When such a right is codified in statute, defendants acquire a due process liberty interest in reasonable access to the evidence that might prove their innocence. *District Attorney's Office v Osborne*, 557 US 52, 68; 129 S Ct 2308; 174 L Ed 2d 38 (2009) (concluding that the defendant had "a liberty interest in demonstrating his innocence with new evidence under state law," and that Alaska law provide sufficient access to the evidence he wished to test).

The trial court, after concluding that MCL 770.16 does not entitle Mr. Porter to the testing he seeks rendering Michigan's statutory scheme constitutionally inadequate, subsequently erred in denying Mr. Porter's motion for the inspection and testing of the duct tape under the Due Process Clause of the Fourteenth Amendment. Mr. Porter has a due process right to such inspection and

testing, given his "liberty interest in demonstrating [his] innocence with new evidence under state law." *Osborne*, 557 US at 68.

MCL 770.16 must allow convicted individuals to test material evidence for the presence of biological material that was never searched for during the original investigation. If it does not, then large categories of currently testable biological material will never be identified.

Touch DNA is such a category of currently testable material that would not have been on investigator's radar in 1995. The duct tape at issue here was never analyzed for DNA evidence, it was analyzed for the presence of trace evidence, some of which was recovered – including the brown human hair referenced earlier. If petitioners are not allowed to examine material evidence for the presence of newly identifiable biological material, then it would be impossible to test any evidence for such material where the evidence was examined before the technology that can identify such material became available, negating the intention of the statute and the statutory scheme developed by the legislature.

CONCLUSION AND RELIEF REQUESTED

For all of the reasons explained in this Application, Mr. Porter respectfully asks this Court to: (1) grant Application for Leave to Appeal; (2) vacate the trial court order denying his motion for inspection and retesting of physical evidence and remand the case for rehearing under the proper standard; or (3) summarily reverse the trial court's order and grant his underlying motion.

Applicant Details

First Name	**Michael**
Middle Initial	**J**
Last Name	**Crowley**
Citizenship Status	**U. S. Citizen**
Email Address	**mjc358@georgetown.edu**
Address	**Address** Street **2724 Ordway Street, NW Apt 4** City **Washington** State/Territory **District of Columbia** Zip **20008** Country **United States**
Contact Phone Number	**3157710922**

Applicant Education

BA/BS From	**Syracuse University**
Date of BA/BS	**May 2014**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**February 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of National Security Law and Policy**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia, Maryland**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Johnson, Eric
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Raab, Michael
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202-841-2415

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Michael J. Crowley
2724 Ordway Street NW, Apt. 4
Washington, DC 20008

June 16, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez,

I am writing to apply for a 2024-2025 clerkship with your chambers. In February 2022, I graduated a semester early from Georgetown University Law Center (GULC). During law school, I attended courses in the evenings while working full-time for the U.S. Government and serving as an officer in the U.S. Army Reserves. Upon graduating from GULC, I joined White & Case LLP (W&C) as an associate in the Washington, D.C. office. I welcome the opportunity to learn from your experience; and I am happy to move to Philadelphia, which is near my wife's hometown.

I believe my professional and academic background will make a strong addition to your chambers. During law school, I interned with the Department of Justice's National Security Division. Following the internship, the Department of Defense (DOD) offered me a full-time position working on legal matters relating to the Committee on Foreign Investment in the United States and Team Telecom. This offer was regarded as highly uncommon and reflected my exceptional work-product and legal acumen. While at DOD, I drafted national security agreements that mitigated national security risks arising from foreign investment, and I prepared informational memoranda for senior policymakers including the President of the United States. I also created and led the DOD team that advises the Federal Communications Commission on national security concerns associated with applications for certain telecommunications licenses.

In March 2022, upon graduating from GULC, I joined W&C where I continue to work on national security legal matters. Due to my outstanding performance, W&C nominated me as a Rising Star with The Legal 500. While this work has primarily focused on regulatory matters, I hope that a clerkship will afford me the experience necessary to refocus my practice on litigation—the practice area that initially inspired my passion for law.

I believe my professional and academic experiences will make a strong addition to your chambers. My resume, transcripts, and writing sample are attached with this application. Additionally, my letters of recommendation from Eric Johnson (Deputy Chief; Department of Justice, National Security Division), Michael Raab (Professor; GULC), and Mary DeRosa (Professor; GULC) are included. I welcome the opportunity to interview with you, and I look forward to hearing from you soon.

Respectfully,
Michael Crowley

MICHAEL J. CROWLEY, ESQ.

2724 Ordway Street, Washington, DC 20008 • (315) 771-0922 • mjc358@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor, Evening Division — **Feb. 2022**
GPA: 3.42/4.00
Journal: Managing Editor for the *Journal of National Security Law & Policy*
Activities: Georgetown Constitution Center Legal Scholar; Federalist Society student member; Summer Associate White & Case LLP (2021)

NATIONAL INTELLIGENCE UNIVERSITY — **Bethesda, MD**
Master of Science in Strategic Intelligence — **May 2018**

SYRACUSE UNIVERSITY — **Syracuse, NY**
Bachelor of Arts in International Relations, minor in Political Science — **May 2014**
Honors: Recipient of Army Reserves Officer Training Corps (ROTC) scholarship; Dean's List; National Society of Collegiate Scholars; and Syracuse delegate to Israel's Lauder School of Government, Diplomacy, and Strategy

LEGAL EXPERIENCE

WHITE & CASE LLP — **Washington, DC**
Associate — **March 2022 – Present**

- Represents multinational companies in all types of litigation across a broad variety of industries, with a particular emphasis on complex commercial litigation
- Defends companies in disputes brought under the False Claims Act before federal district and appellate courts
- Led social media company's implementation of anti-money laundering and sanctions compliance program globally
- Negotiates complex and highly contentious national security agreements with the Committee on Foreign Investment in the United States (CFIUS)
- Advises clients on sensitive national security investigations and compliance matters arising from laws and regulations administered by the U.S. Department of Treasury's Office of Foreign Assets Control, the U.S. Department of Commerce's Bureau of Industry and Security, the U.S. State Department's Directorate of Defense Trade Controls, and the Federal Communications Commission (the FCC)
- Leads client meetings and provides legal guidance with minimal oversight
- Presented *CFIUS Considerations and Concerns* at White & Case's inaugural Foreign Direct Investment conference (Paris, France)
- Nominated as a Rising Star for The Legal 500's attorney rankings

U.S. DEPARTMENT OF DEFENSE — **Washington, DC**
Chief of Staff for FIR Team Telecom Cell, Foreign Investment Review Section — **June 2020 – May 2021**

- Promoted to Chief of Staff for the Foreign Investment Review Section's Team Telecom Cell, while continuing to serve as Mitigation Advisor
- Led the office's participation on Team Telecom in advising the FCC with respect to national security and law enforcement concerns arising from certain telecommunications licenses

MICHAEL J. CROWLEY, ESQ.

2724 Ordway Street, Washington, DC 20008 • (315) 771-0922 • mjc358@georgetown.edu

Mitigation Advisor for Foreign Investment Review Section **Jan. 2020 – May 2021**

- Represented DoD as a CFIUS member agency; reviewed complex mergers and acquisitions and identified the national security risks arising from such transactions
- Negotiated the imposition of mitigation measures aimed at addressing national security risks
- Provided recommendations to Secretary-level committee members and the President of the United States

U.S. DEPARTMENT OF JUSTICE **Washington, DC**
Legal Intern for the National Security Division **May 2019 – Dec. 2019**

- Reviewed dozens of cases in support of DOJ's participation on CFIUS
- Negotiated the imposition of national security agreements with private parties
- Researched and analyzed novel legal issues relating to DOJ's National Security Division mission
- Offered a full-time position on DoD's CFIUS team due to outstanding performance while interning at DOJ

NON-LEGAL EXPERIENCE

UNITED STATES ARMY RESERVES **May 2014 – Sept. 2022**
Officer (2nd LT – CPT)

- Provided targeting and geospatial analysis to the Army Geospatial Intelligence Battalion, National Geospatial-Intelligence Agency (USAR 2200 Military Intelligence Group, Detachment 4)
- Led over fifty soldiers in brigade's headquarters company and supported detachments within the State Department, DIA, NGA, and NSA (National Intelligence Support Group, HHC)
- Provided intelligence and Information Operations support to 151 Theater Information Operations Group

DELOITTE CONSULTING, LLP & ACCENTURE FEDERAL SERVICES **Washington, DC**
Policy Consultant **Jan. 2017 – May 2019**

- Consultant for National Security and Defense portfolio, Strategy and Operations practice
- Led Intelligence Community (IC) client's policy adjudication process and ensured that federal regulations were accurately interpreted and derivatively applied throughout the agency

THE BUFFALO GROUP **Washington, DC**
All-Source Intelligence Analyst for the Defense Intelligence Agency **June 2015 – Jan. 2017**

- Analyzed and published intelligence reports for DIA's Afghanistan/Pakistan Task Force, CJCS-J5 (Pentagon) and DIA's Middle East Africa Regional Center, Yemen Branch (DIAHQ)

ADDITIONAL INFORMATION

Security Clearance: Top Secret/Sensitive Compartmented Information security clearance with full-scope and counterintelligence polygraphs
Bars: Maryland Bar, District of Columbia Bar

Record of: Michael J. Crowley
GUID: 820218403

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Feb 01, 2022
Georgetown University Law Center
Major: Law

Transfer Credit:
American University
School Total: 19.00

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	004	05	Constitutional Law I: The Federal System Nicholas Rosenkranz	3.00	B+	9.99	
LAWJ	121	07	Corporations Charles Davidow	4.00	P	0.00	
LAWJ	128	08	Criminal Procedure Brent Newton	2.00	B	6.00	
LAWJ	1491	10	Externship I Seminar (J.D. Externship Program) Arun Rao		NG		
LAWJ	1491	92	~Seminar Arun Rao	1.00	A	4.00	
LAWJ	1491	94	~Fieldwork 3cr Arun Rao	3.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	6.00	19.99	3.33
Cumulative	32.00	6.00	19.99	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	007	97	Property John Byrne	4.00	P	0.00	
LAWJ	3093	09	Foreign Investment & National Security: The Committee on Foreign Investment in the United States Janine Slade	2.00	P	0.00	
LAWJ	455	07	Federal White Collar Crime Mark MacDougall	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	9.00	0.00	0.00	0.00
Annual	22.00	6.00	19.99	3.33
Cumulative	41.00	6.00	19.99	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2020							
LAWJ	317	06	Negotiations Seminar Cathy Costantino	3.00	P	0.00	
LAWJ	360	16	Legal Research Skills for Practice Rachel Jorgensen	1.00	P	0.00	
LAWJ	361	06	Professional Responsibility Stuart Teicher	2.00	P	0.00	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	6.00	0.00	0.00	0.00
Cumulative	47.00	6.00	19.99	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	025	07	Administrative Law Glen Nager	3.00	B+	9.99	
LAWJ	1402	05	National Security Regulation Allison Bender	2.00	A	8.00	
LAWJ	396	10	Securities Regulation Barry Summer	2.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	7.00	5.00	17.99	3.60
Cumulative	54.00	11.00	37.98	3.45

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	219	07	Emerging Growth Companies and Venture Capital Financings Derek Colla	2.00	B+	6.66	
LAWJ	524	07	Supervised Research Mary DeRosa	2.00	A	8.00	
LAWJ	876	11	International Business Transactions Don De Amicis	3.00	P	0.00	
LAWJ	962	09	U.S. Export Controls and Economic Sanctions Barbara Linney	2.00	B+	6.66	

	EHrs	QHrs	QPts	GPA
Current	9.00	6.00	21.32	3.55
Annual	22.00	11.00	39.31	3.57
Cumulative	63.00	17.00	59.30	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2021							
LAWJ	1524	06	Statutory Interpretation Joseph Laplante	3.00	A-	11.01	
LAWJ	940	09	Securities Law and the Internet Donna Norman	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	5.00	5.00	19.01	3.80
Cumulative	68.00	22.00	78.31	3.56

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1127	08	Cyber and National Security: Current Issues Seminar Mary DeRosa	2.00	A-	7.34	
LAWJ	165	09	Evidence Mushtaq Gunja	4.00	B	12.00	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	P	0.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	421	09	Federal Income Taxation Dorothy Brown	4.00	B	12.00	

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Michael J. Crowley
GUID: 820218403

---------- **Transcript Totals** ----------

	EHrs	QHrs	QPts	GPA
Current	17.00	14.00	44.66	3.19
Annual	22.00	19.00	63.67	3.35
Cumulative	85.00	36.00	122.97	3.42

---------- **End of Juris Doctor Record** ----------

CROWLEY MICHAEL J 4819050 08/02

06/29/19 1 OF 1

FALL 2018

LAW-504	CONTRACTS	04.00	A	16.00
LAW-516	RESEARCH & WRITING I	02.00	A-	07.40
LAW-522	TORTS	04.00	A-	14.80

LAW SEM SUM: 10.00HRS ATT 10.00HRS ERND 38.20QP 3.82GPA

SPRING 2019

LAW-501	CIVIL PROCEDURE	04.00	A-	14.80
LAW-507	CRIMINAL LAW	03.00	B-	08.10
LAW-517	RESEARCH & WRITING II	02.00	B+	06.60

LAW SEM SUM: 9.00HRS ATT 9.00HRS ERND 29.50QP 3.27GPA

FALL 2019

LAW-503	CONSTITUTIONAL LAW	04.00	--	--.--
LAW-508	CRIMINAL PROCEDURE I	03.00	--	--.--
LAW-654A	GOVERNMENT CONTRACTS FORMATION			
	GOVERNMENT CONTRACTS:FORMATION	02.00	--	--.--

LAW CUM SUM: 19.00HRS ATT 19.00HRS ERND 67.70QP 3.56GPA

END OF TRANSCRIPT

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Michael Crowley for a clerkship. As one of Mike's supervising attorneys at the Department of Justice, I can speak with confidence about Mike's legal research and writing skills, and his professional demeanor.

Our office leads the Department of Justice's work in protecting national security from risks arising from foreign investments and transactions, telecommunications, technological supply chains, and related aspects of data security, cybersecurity and economic security. We regularly advise senior leadership on a range of legal and policy issues often at the intersection of emerging technology, foreign investment and national security, and work closely with the National Security Council and other interagency partners to address these issues. Attorney caseloads are significant, and cases are complex. Interns are expected to analyze and brief on sophisticated points of law, develop factual records and – in some cases – provide input on policy decision points.

Mike performed beyond expectations during his internship with our office. As a supervisor, and as a former federal district court clerk, I appreciate how critical legal research and writing skills are to a successful clerkship and the practice of law. Mike demonstrated exceptional research and writing skills during his tenure, quickly adapting to the unique legal and policy issues addressed by our office. Although Mike worked on a range of projects during his internship – including one of the first enforcement actions under the Foreign Investment Risk Review Modernization Act – he worked closely with me on a memorandum analyzing proposed language for a draft executive order addressing risks related to the United States' telecommunication networks. Mike's well-researched memorandum provided me with a solid foundation for assessing the law and tailoring an appropriate response to senior leadership and other policymakers. I believe this example illustrates the strong research and writing skills that Mike would bring to your Chambers.

As a legal intern, Mike also sought feedback for each substantive assignment. Unlike many interns – and particularly those with less professional experience – he quickly appreciated that the demands of legal writing in practice can differ from those in law school, and adapted accordingly. This willingness to review critically and objectively his work will serve Mike well in the close working relationships required in a federal clerkship.

Without question, Mike will be a fine addition to Chambers and your staff. He is a driven young man, who possesses a solid work ethic, and a positive attitude. He has set high goals for himself, and I fully expect him to meet – if not exceed – those goals. I give Mike my unequivocal recommendation, and trust that he will approach the demanding work of a federal clerk with the same commitment he brought to our office.

If desired, I would be happy to comment further by phone or email. I can be reached at 202.514.9476 or eric.s.johnson@usdoj.gov.

Sincerely,

/s/ Eric S. Johnson .
Eric S. Johnson
Principal Deputy Chief
National Security Division, Foreign Investment Review Section

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to write in strong support of the application of Michael Crowley for a judicial clerkship.

Mike was a student in my Federal Courts class in the Fall 2021 semester. He was a pleasure to have in the class, and he made positive contributions to our discussion of the complex material that we covered—which included issues of justiciability, sovereign immunity, federal-question jurisdiction, habeas corpus, and the law governing suits under 42 U.S.C. § 1983. Mike's deep interest in the subject matter of the course was evident not only from his class participation but also from his close attention outside of class to matters of relevance to the course that arose during the semester.

Mike is very likeable and will be a welcome presence in chambers, and his considerable employment and academic experience should make him an excellent law clerk. Mike's ability to handle a full course load while also managing the responsibilities of a demanding full-time position at the Department of Defense as well as the rigors of Army Reserve membership is a testament to his extraordinary discipline and commitment to public service. And he has a strong interest in clerking, both because of his interest in public service and his goal of pursuing a career as a litigator.

Please feel free to contact me (202-514-4053) if you would like any additional information.

Sincerely,

/s/ Michael S. Raab

Michael S. Raab

Michael Raab - raabm@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand Michael Crowley has applied for a clerkship in your chambers. Michael is a skilled, mature student with a strong work ethic. I have been very impressed with him and recommend him highly.

As you know, Michael was a student in Georgetown's evening program. The evening students are an impressive group; most of them work full time while carrying a course load that is only slightly lighter than our full-time students. While in law school, Michael was an officer in the U.S. Army Reserves and worked full time as a civilian at the Department of Defense. He also participated in a number of extracurricular activities during law school, including working as a managing editor of Georgetown's Journal of National Security Law & Policy and as a student law scholar at the Center for the Constitution. Despite all of these obligations, he was a conscientious and successful law student. Michael graduated from law school with a strong record and has gone on to be an associate at a reputable law firm.

I first met Michael in the fall of 2020, when he asked me to supervise him on an independent study research project. In his paper, Michael analyzed whether there were due process limitations on the U.S. government's ability to identify and punish companies as part of an effort to secure the supply chain. The final paper was substantively excellent, well-written, and well-organized. He received an A for the independent study.

Michael was also a student in my "Cyber and National Security" seminar in the fall of 2021. The course explores the challenges of applying domestic and international law to cyber problems. It covers many thorny issues related to malicious hacking, particularly by foreign actors. For example, we looked at criminal prosecution of cybercrimes under the Computer Fraud and Abuse Act; how cybersecurity measures can implicate Fourth Amendment and privacy concerns; and a variety of legal issues related to private sector efforts to address cyber threats. Michael's final paper looked at the legal and practical issues that private sector companies face in preparing for and responding to data breaches and ransomware attacks. The paper provided clear and practical analysis and recommendations. It was ambitious and well written. Michael received an A- in the class.

Michael's is a talented writer with a strong work ethic. I believe he would be an excellent judicial clerk. Please let me know if I can provide any additional information.

Sincerely,

Mary B. DeRosa
Professor from Practice
Georgetown Law
mbd58@georgetown.edu
202-841-2415

Due Process Limitations on Executive Action to Secure the Supply Chain

Student Author: Michael Crowley
Professor Advisor: Mary DeRosa
Date: May 19, 2021

Contents

I. Introduction

Information and communications technology and services ("ICTS") supply chains are critical to U.S. national security.[1] U.S. public and private sector institutions and entities at all levels rely on ICTS which underpin the economy; support critical infrastructure; and facilitate the nation's ability to store, process, and transmit data.[2] In its Annual Threat Assessment issued on April 9, 2021, the Intelligence Community identified the compromise of software and IT service supply chains by state sponsored actors as a growing threat to U.S. national security.[3] The purchase and use of ICTS produced or controlled by foreign adversaries can create opportunities for those adversaries to exploit vulnerabilities in the ICTS causing harm to immediate targets specifically and the U.S. more broadly.[4]

In response to this risk, President Trump issued an Executive Order finding a threat to U.S. national security and national emergency arising from the acquisition and use in the United States of ICTS supplied by foreign adversaries.[5] The EO affords the Secretary of Commerce the authority to prohibit certain transactions involving telecommunications equipment or services made or supplied by persons designated by the U.S. Government as "foreign adversaries" when the transactions are deemed to pose an "unacceptable national security risk."[6] Pursuant to the EO, the U.S. Department of Commerce has issued an interim final rule to implement the EO's requirements. This rule is designed to establish the

[1] Securing the Information and Communications Technology and Services Supply Chain; 86 Fed. Reg. No. 11 4909 (Jan. 19, 2021).
[2] *Id*.
[3] Office of the Director of National Intelligence, Annual Threat Assessment of the U.S. Intelligence Community 21 (Apr. 9, 2021).
[4] 86 Fed. Reg. No. 11 4909 (Jan. 19, 2021).
[5] Exec. Or. 13873 84 FR 22689 (May 15, 2019)
[6] 86 Fed. Reg. No. 11 4909 (Jan. 19, 2021).

processes and procedures creating a framework to prohibit, mitigate, and unwind ICTS transactions that satisfy certain predicates.

This paper analyzes these new regulatory powers and assesses whether and to what extent U.S. Constitutional protections limit the government's ability to exercise these powers. Specifically, it addresses the question of whether the Fifth Amendment's due process clause constrains the U.S. Government's ability to identify and punish companies whose products or services raise supply chain related national security concerns? In answering in the affirmative, this paper applies the liberty and property protections contained within the Fifth Amendment to Commerce's interim rule. Additionally, this paper finds that the interim rule, as currently drafted, risks failing to provide adequate due process protections to certain entities that may be identified as a national security risk in specified circumstances. A definitive answer as to whether the U.S. Government will provide sufficient due process protections to entities impacted by the new regulatory authority depends on precisely how the government will enforce the rule and adjudicate issues arising from its designations.